DRAFT—CITE AND CIRCULATE ONLY WITH PERMISSION

OFFICER REMOVAL IN THE EARLY REPUBLIC

Peter Kastor, Andrea Scoseria Katz, and Noah A. Rosenblum*

The Supreme Court's Article II jurisprudence rests on a fundamental misunderstanding. Current law presumes that the Framers understood the President's removal power to be rooted in the Constitution. Early republic practice indicates this conclusion is mistaken. Removal was a statutory feature of federal office, not an inherent presidential power.

This Article returns to the Founding Era to show how removal operated in practice. Drawing on two new, hand-coded datasets built over several years, it catalogs every statute passed between 1789 and 1820 that created a new office and tracks the careers of those who held these positions. It is, to our knowledge, the most comprehensive picture of early federal officeholding attempted.

The resulting study shows that law varied the "who," "how," and "why" of removal to achieve good governance ends. Statutes created offices with a wide variety of structures that responded to the particular responsibilities and dangers a given office presented. Significantly, offices of trust, expertise, or with a high risk of conflicts of interest often included specialized "automatic" removal provisions that did not depend on executive power.

Nor did early presidential practice support an indefeasible removal power. Presidents fired seldom, and almost always for manifest fault such as drunkenness and absenteeism. Only on

*Samuel K. Eddy Professor of History and Professor, Professor of Law (by courtesy), Washington University in St. Louis; Professor of Law, Washington University School of Law in St. Louis; Professor of Law, NYU School of Law, respectively. For comments and conversation thanks to Nathaniel Donahue, Jane Manners, Daniel Hulsebosch, [others], and audiences at the American Society for Legal History annual meeting [and other venues]. For superlative research assistance, thanks to Lucas Ebel, Brooke Van Horne, Hayden Klein, Zachary Lewis, Matthew McKenna, Grace Protasiewicz, Jordan Sicklick, [others].

very rare occasion did Presidents fire officials for the express purpose of partisan advancement. We found no evidence that any early President ever removed an officer of the United States in contravention of a statute. In practice, "at will" removal operated as removal for cause. Presidents struggled with the reach of their authority but did not remove for no reason or just because an officer was not in line with the President's agenda.

These findings have important consequences for law and scholarship on the presidency. This Article proposes a fundamentally different interpretation of the relationship between politics and removal than the conventional wisdom that operates in most scholarship in law, history, and political science. It should displace the aging studies on removal by Carl Fish and Carl Prince that have heretofore served as the point of departure for scholars and advocates. It undermines originalist claims to an indefeasible Article II removal power and the related argument that removal is an inherently executive power. And it illustrates a different, more defensible way of bringing history to bear on law: reconstructing legal understanding on the basis of contextual interpretation.

TABLE OF CONTENTS

OFFICER REMOVAL IN THE EARLY REPUBLIC

Peter Kastor, Andrea Scoseria Katz, and Noah A. Rosenblum

INTRODUCTION

Removal is not an indefeasible constitutional power. It is a feature of the statutory design of the office. This, at least, is how political actors in the early republic understood where the legal power to fire came from.

This Article uses two original, hand-coded data sets to reconstruct how officer removal operated in the early republic. Together, these data sets constitute the most comprehensive empirical picture of the law and practice of federal officeholding from the Founding to 1820, when the so-called Four Years Law, the Tenure of Office Act of 1820, helped usher in the rise of the spoils system.

The data reveals that removal was understood to be an integral part of the statutory design of an office. It was a process developed in concert by the President and Congress as part of a broader effort to build the federal state and establish legal norms of office-holding. Statutes that created offices varied who had the power to remove, what procedures removal had to follow, and the reasons for which removal would be appropriate. Some offices were explicitly designed to be removable at pleasure; many others were silent on the person, mechanisms, and reasons for removal. Offices of trust, offices requiring expertise, and offices that involved a high risk of conflicts of interest or self-dealing, however, often included detailed specifications governing the who, how, and why of removal. Most officers could be removed by the President, but not all, underscoring that removal was not necessarily or always an executive power but rather a feature of office determined by statute. Some statutes included automatic removal, effected directly through the statute, without even the possibility of presidential involvement.

Early republic practice fills in this legal scheme while reinforcing its main lines. Our comprehensive study of the careers of federal officeholders has not uncovered a single instance in which an officer was removed by the President in violation of a statute. Presidents seem to have respected the who, how, and why of removal as specified in statutory law. Conversely—and most likely as a result—Congress did not challenge the President's authority to fire federal employees.

Moreover, early republic Presidents seem to have understood at-will removal differently from today. Officers who served at presidential pleasure were rarely removed: the most common cause of vacating an office was resignation, followed by abolition of the office, appointment to other offices, and the death of the office holder. When officers were removed, it was almost always for cause, especially drunkenness, absenteeism, or other dereliction of duty. Before the enactment of the Four Years Law, it does not seem that rotation in office for partisan political reasons was an accepted practice of federal officeholding. When, in 1801, control of government shifted from the Federalists to the Republicans, even the incoming Jefferson administration usually treated partisan removal as an insufficient ground, preferring to remove Federalists who demonstrated manifest bad behavior.

Drawing inferences from these historical findings for contemporary law is delicate. Early Presidents did not keep systematic records. Some of the records that were created are now lost. Most challengingly, the strangeness of the government as it operated then resists easy characterization now. So much was different, it is difficult to avoid making false equivalencies or unjustified inferences. Those challenges limit what can be said with certainty about law at the Founding and render problematic some of the ways scholars and advocates have mobilized early federal removals in contemporary legal and political debates.

Nevertheless, this study has uncovered enough to undermine conventional legal wisdom. The Article's findings decisively refute the contention that the Framers believed removal was an inherently executive power by documenting several statutes in which removal did not operate through an exercise of executive power at all. The Article's findings also indicate that removal was not understood as a constitutional power rooted in Article II but a feature of the office's statutory design rooted in Article I. This has important implications for interpreting the Supreme Court's recent decision in *Trump v.*

Slaughter and understanding Congress's powers of institutional design today.[1]

In a more scholarly vein, this Article should supplant the long-outdated studies of officeholding in the early republic by Carl Fish and Carl Prince, whose work remains influential. Their pathbreaking research helped identify some of the puzzles about the size and shape of administration in the first years after the Founding and motivated important questions about the reach of the President's personnel powers. But Fish and Prince were candid about their studies' empirical limitations, and they were insensitive to key legal distinctions. Nevertheless, courts and scholars have continued to rely on their work, leading them to errors.

That there remains such a large gap in the literature in a mature scholarly field is somewhat surprising. The reach of the President's power of removal is a controversy so old that it was already hoary by the 1830s. When the issue reached Justice Joseph Story, the great jurist all but uttered a resigned shrug, avowing that "forty years' experience" had settled the question in the President's favor.[2]

Yet, over the last sixteen years, a once-settled debate has become unstuck, largely because of the Supreme Court. Under the leadership of Chief Justice John Roberts, the Court has transformed removal from a tool of presidential management into a structural principle of government design.[3] Its approach is radical, and risks rendering much of the actually existing federal government unconstitutional.[4] On the Court's telling, not even "modest restrictions" are permitted on the President's power to remove executive branch officers.[5]

---

[1] Trump v. Slaughter, 609 U.S. __ (2026).

[2] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 397 (1833). Even for Story, however, this settlement did not mean that statute could not limit the circumstances under which removal could happen.

[3] On removal as a tool of presidential management, see e.g. JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE (1986); STEPHEN J. ROCKWELL, THE PRESIDENCY AND THE AMERICAN STATE: LEADERSHIP AND DECISION MAKING IN THE ADAMS, GRANT, AND TAFT ADMINISTRATIONS (2023).

[4] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 514 (2010) (Breyer, J., dissenting); Seila Law LLC v. CFPB, 591 U.S. 197, 261 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part); Noah A. Rosenblum & Roderick M. Hills, Jr., *Presidential Administration After* Arthrex, 75 DUKE L.J. 1523 (2026).

[5] Collins v. Yellen, 594 U.S. 220, 256 (2021)

The reach of the Court's interpretation has put pressure on its authorities. According to the Court, the President's expansive removal power "follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*, 272 U. S. 52 (1926)."[6] But Article II is famously silent on removal, and so were the debates at Philadelphia.[7] Faced with these silences, defenders of the theory of the "unitary executive" have tried to establish that Article II, which vests the "executive power" in the President, contains (or contained) a removal power as a matter of common public understanding.[8] To do so, Unitary Executive Theory (UET) champions have turned to the Framers' models of executive power and to early post-ratification enactments. One influential line of scholarship has appealed to the practice of early Presidents, whom, it contends, fired assertively, revealing a working theory of the office whereby removal belonged to the President as a matter of constitutional right, not statutory grant.[9]

These arguments have proved consequential. Yet they build without a foundation. Shockingly, we lack an empirical account of how removal actually worked at the Founding. Unitary theorists largely rely on Fish and Prince for their history. American historians, for their part, have not focused with granularity on the question of officer removal. And while the Court's jurisprudence has catalyzed a boom in legal scholarship on the history of removal, that new scholarship has focused more on refutation than systematic reconstruction.

This Article offers originalist judges, lawyers who accept the importance of historical gloss, and scholars of the early republic a more accurate and complete picture of how officer removal operated. At the same time, it reinforces the limits of originalist approaches to the law of institutional design and highlights the challenges of doing serious history with an eye to legal doctrine.

---

[6] Seila Law LLC 591 U.S. at 204 (2020); and *c.f.* Slaughter v. Trump, 609 U.S. __ (slip op. at 1-2) (narrating the same story using the same evidentiary supports).

[7] FORREST MCDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY (1994).

[8] On the Constitution's silence regarding removal, see MCDONALD, *supra* note 7, at 5; Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023).

[9] *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008).

The dearth of comprehensive accounts of early republic removal poses a special problem for originalist debates about the President's removal power. Proponents of a presidential removal power rely on inferences from known examples of removal. Critics point to other examples incompatible with the claimed inferences. But both parties argue on the basis of a relatively small number of cases without any sense of whether those cases are representative or what they mean in context. Early Presidents fired; everyone knows that. But to know what that means for the law, we need to know more about who they fired, how they fired, and why. Did they fire in great numbers? In defiance of statutory limits? For motives of party-building in addition to considerations of "faithful execution"? Were officers removed, for that matter, by presidential directive at all, or by supervisors down the chain of command?

This Article addresses these and related questions on the basis of new evidence to construct an empirical account of removal in the early republic. Based on two original datasets, one on removals, the other on office-creating statutes, this Article constructs a theory of early removal grounded in the extant historical record.

The first dataset draws from a much larger data collection project by Professor Kastor, *Creating a Federal Government*, that reconstructs the public careers of over 38,000 men and women who served as federal employees from 1789-1829.[10] This Article focuses on a slice of the broader Kastor database, picking out removals of federal civil officers subject to senatorial advice and consent between 1789 and 1820.

In total, we counted 66 removals through the first five presidential administrations.[11] Of these, 24 were for cause, including bad character, neglect of duty, or attempts to undermine the administration. Eleven were discretionary.[12] Another eleven were for political reasons.[13] Twenty-five were for

[10] Peter J. Kastor, *Creating a Federal Government, 1789–1829*, https://creatingafederalgovernment.wustl.edu (last visited __).

[11] Were military officers to be included, the shifts in personnel would be much greater, as officers were commissioned and discharged en masse.

[12] This category includes officers the president personally disliked, or at least their politics.

[13] These all occurred under President Jefferson and tended to be recorded in the same way: "To give some participation in office to the [incoming Jeffersonian] Republicans." [cite to data set TK]

reasons unknown.[14] Four were for other reasons.[15] Disaggregated by President, the number of removals were as follows: one by President Washington, three by Adams, forty-seven by Jefferson, five by Madison, and ten by Monroe (before the enactment of the Tenure of Office Act of 1820).[16]

This data is limited to individuals who actually held office and who were removed by presidential action. A number of individuals went through Senate confirmation but never held offices. In some cases (most notably the justices of the peace at the center of *Marbury v. Madison*), the reasons they did not hold office are known. In others, however, they are not. Several shared Marbury's fate, securing confirmation in the final days of the Adams administration only to disappear from the rolls. For example, on February 24, 1801, Henry Preble was confirmed as consul to Cadiz. On January 6, 1802, over a year later, Jefferson nominated Joseph Iznardi, Sr., "to be Consul at Cadiz, vice Henry Prebble, nominated February 18, but not appointed.[17]" But what became of David Latimer, who was confirmed as a territorial judge in Mississippi in 1802 but does not appear to have held that office? Likewise, what about Jonathan Fenwick, who in 1815 was confirmed as consul to Alicante, Spain, but never held office?[18] Likewise, this data does not include offices that were eliminated through legislation, such as the elimination of judicial districts and circuits in 1802 and the termination of territorial offices as a territory transitioned into statehood.

Of course, federal employees other than those who underwent Senate confirmation were also removed. They ranged from clerical staff in the central offices in Washington to

---

[14] This fact reflects limitations in the data. It was only in 1816 that Congress passed a continuing resolution requiring the executive to produce a list of all federal employees every two years. The result, entitled *A Register of Officers and Agents, Civil, Military, and Naval, in the Service of the United States*, rationalized the task of record keeping regarding officeholders of the federal government.

[15] These included promotion to another office or receipt of a new commission.

[16] This data includes the small number of occasions in which a president chose to let a statutory term of office expire without renewal or recalled diplomats without appointing successors. The data does not include circumstances in which an officer's employment ceased due to the elimination of an office by statute. But note that Fish's tables yield 79 removals through 1817. *See* Carl Russell Fish, *Removal of Officials by the Presidents of the United States, in* 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1899, AT 67, 69–72 (Washington, Gov't Printing Off. 1900).

[17] 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 403 (Duff Green 1828).

[18] *Id.* at 405–07; 2 *id.* at 627.

inspectors in the nation's ports of entry to postmasters distributed in every corner of the nation. Systematically determining which of these employees were removed is impossible given the extant records of the early American republic. While there are occasional files for specific cases or isolated time periods, they are not generalizable. Restricting the research to Senate-confirmed officers provides not only rich detail but also cohesive, apples-to-apples comparisons across time.

Our second data set, developed by Professors Katz and Rosenblum, gathers all the statutes from the First through Sixteenth Congresses that created or modified a federal office. This data originates from the early published volumes of the *Statutes at Large.* Research uncovered 403 laws that established federal offices.[19] Among these are some well canvassed in the removal scholarship, such as those drawing up the first federal agencies—Foreign Affairs, War, Treasury (the famed "Decision of 1789")—as well as more mundane ones, such as those creating the jobs of customs officials and tax collectors, setting up governments for the territories of Ohio, Missouri, and so forth. It also includes several offices with unusual characteristics, like the officers at the Mint, that have not received significant attention.[20]

Of the office-creating statutes in our data set, only 89 contain some language on removal; the rest are silent. Those that do say something about removal include several types of removal provisions. In general, these statutes specify who may

---

[19] We have aimed for completeness in the relevant universe of early removals and statutes but cannot guarantee it. Other studies of the period focused on statutes not found in our list, but some of this legislation did not speak to removal, but rather the president's directive authority. *See, e.g.*, Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1480 n.135 (1997) (discussing Act of Mar. 3, 1795, ch. 48, 1 Stat. 441); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 17 n.66 (1994) (discussing Act of Mar. 3, 1797, ch. 20, 1 Stat. 512); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 656 n.529 (1994) (discussing the congressional debates preceding the Act of Feb. 20, 1792, ch. 7, 1 Stat. 232). We believe nonetheless that ours in the most complete data-collection effort.

[20] *But see* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012); Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299 (2019); Aditya Bamzai & Peter M. Shane, *The Removal Question: A Timeline and Summary of the Legal Arguments*, 78 STAN. L. REV. ONLINE 64 (2025); Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1 (2023).

remove, how they may remove, and for what reason. Language specifying at-will removal, usually by the president, is common. (When statutes include such language, it often mirrors the formula used in creating the office of the Secretary of Foreign Affairs, who was made removable "by the president.") But just as common is language causing removals automatically if certain conditions are met. There is also language that combines a fixed term of office plus at-will removal, and various bespoke arrangements, which we term special removals. Individual statutes sometimes include multiple different kinds of removal language in the same law

Two larger trends emerge from the datasets considered jointly. First, presidential removal appears to have been the default rule. Early statutes were often silent on removal, but practice suggests that that silence was interpreted as permission for the President to remove. Later statutes explicitly vested an at-will removal power in the President. Second, despite this default rule, removal was not an exclusively executive power. While the President most often wielded the power to effectuate a removal, he did so in accord with a set of authorities and guardrails established by statute. In some cases, he was not involved in removal at all. This can be seen in two classes of statutes that included removal provisions that did not operate through any exercise of executive or presidential power: statutes that insulated early officers from removal and statutes that created alternative removal mechanisms running through the judiciary or without the involvement of executive power.

This study has several consequences for current scholarship. Most significantly, it refutes the idea that removal was quintessentially or exclusively an executive power and supports the idea that the power was shared. Removal could be—and was—vested in actors other than the President, especially courts, who could remove officers for malfeasance, bribery, or corruption. This does not mean Presidents did not have the power to remove. Early Presidents enjoyed a considerable removal power. But their authority was circumscribed by law and practice.

To the extent that the Founders defaulted to presidential removal, they apparently did so to promote their understanding of effective administration. Where the values of presidentialism and good government diverged, early Congresses embraced the latter. In the early republic at least, the reach of removal was less a question of settling the scope of the executive power than a tool of management deployed by Congress to ensure an effective administration.

That conclusion has important implications for contemporary doctrine. It brings into relief the divergence between the logic of the recent *Slaughter* opinion and originalist constitutional interpretation. Far from applying the original public meaning of the Constitution, or its meaning as understood by contemporaneous lawyers and political actors, the *Slaughter* Court engaged in a functional analysis dressed in historical rhetoric. To that extent, this study should open up space for originalists to cabin *Slaughter* and consider government design that includes limitations on presidential removal, particularly for offices of trust or expertise or those that raise the possibility of conflicts of interest or risks of self-dealing. It should also suggest to would-be institutional designers the wide range of removal mechanisms other than presidential removal lying to hand for ready use in our history and tradition.

This study also invites functionalists to embrace historical gloss as a method of legal argument. The Framers, like functionalists today, were pragmatic, seeking to design a government that was simultaneously efficacious and accountable. We can continue to take inspiration from their example.

At the same time, this study counsels caution about turning to history to resolve contemporary legal disagreements. The early republic was a time of intense legal and political creativity. Lawmakers experimented with different types of officeholding as they sought to make the written Constitution into a workable government. The lines separating legal and non-legal forms of constraint—as well as the meaning of "legal constraint" itself—were malleable and evolving. The legal structures of officeholding were inextricable from the culture of officeholding. This is part of what made the revolution in officeholding inaugurated by the rise of the Jacksonian spoils system so striking. But it also makes it difficult to draw simple doctrinal conclusions for today from early republic law and practice.

This Article illustrates an alternative approach to studying the legal past. Rather than treating past law as selfevidently accessible to present readers, it seeks to understand it through what we know about past legal practice. The Article thus shifts the focus away from abstract debates about government to practices of governance. The familiar set-pieces for any study of the early federal system—Madison's *Notes on the Federal Convention, The Federalist Papers,* etc.—tell only one part of the story over a relatively short period of time. How the people who wrote these texts went about the actual art of governing tells a different story that took form over the course of decades. That other story of practice, we contend, better illuminates the public law of the early republic.

The remainder of this Article proceeds in four parts. Part I traces the central role of historical explanation in the recent transformation of removal jurisprudence. It lays out the historical narrative favored by the Supreme Court and originalist legal scholars. It then critiques the evidentiary basis on which that narrative relies.

Parts II and III use our two new datasets to paint a better, more empirically defensible picture of removal in the early republic. Part II draws on the *Creating a Federal Government* database to provide the most comprehensive account of which federal officers were removed, how, and for what reasons. It illustrates that officer removal was surprisingly rare: for the most part, continuity in office (even over decades), not President-driven turnover, was the norm. When people did leave office, it was most often by resignation, death, reassignment, or the elimination of their office—not removal. Further, while Congress treated presidential removal as a default rule, useful in allowing bad officers to be fired quickly, this rule could, and often was, modified where Congress had other ideas of what good government required. This could include automatic removal for malfeasance outside the presidential chain of command, or removal by other actors, including judges.

Because federal employment records are incomplete, we will never have a full picture of how removal law actually worked in the early republic. Part III enriches the necessarily incomplete picture of Part II by turning from law "in the streets" to law "in the books." It develops a theory of early republic removal law on the basis of a study of all the statutes passed by the first sixteen Congresses that created a federal office, interpreted in light of what we know about removal practice. It concludes that removal was a shared power designed around considerations of good government, not a constitutional distribution of powers.

Part IV explains what this empirical investigation means for current law and scholarship. Most significantly, it refutes the idea that removal was quintessentially or exclusively an executive power, and thus cuts against the Supreme Court's most recent holdings on presidential removal. It suggests to legal historians that the conventional narrative on removal bears reexamination, while drawing attention to the consummate pragmatism of the Founders, who seem to have experimented with a wide range of accountability mechanisms other than removal.

It also champions a different approach to understanding the history of separation of powers law and so to using history in legal argument more generally. It illustrates the benefits of examining the Constitution through attention to statutes, institutions, and practices of government. This approach requires that we hold in abeyance our conviction that we know what the Constitution means and open ourselves to discovering how it worked through the writings and practices of past generations. This attitude not only reveals new insights into the meaning of removal law but opens up a broader reexamination of the place of the President in the early republic. It draws attention to the role and power of Congress, as compared to the President, and begins to make tractable one of the most important open questions in Article II jurisprudence: the source and reach of the President's directive authority.

A brief conclusion explains how the history told in this Article changed as a result of the Four Years' Law and recapitulates our main findings.

I. The Uses of History in Removal Law

In the last decade and a half, the Supreme Court has transformed the law of removal, elevating the President's power to remove over Congress's countervailing authority to structure the government. Relying heavily on historical gloss to inform evolving doctrine, this body of law has placed renewed pressure on the reliability of the evidence on the history of removal.

But judge-made doctrine and scholarship alike have painted an inaccurate picture of removal in the early republic. In particular, they overemphasize political removals, make invalid assumptions about how removal operated, and fail to grapple with the wide range of early republic removal statutes and practices.

This Part reviews recent doctrinal changes and scholarly interventions related to the removal power to show their unsound historical foundations. Section A briefly surveys the Supreme Court's removal revolution, culminating in *Trump v. Slaughter*, to bring out how the Court has traded Congressional supremacy in government design for constitutional presidentialism. Section B critically assesses the legal justifications for that shift, observing where it relies on unsound historical assumptions and inadequate empirical bases. Section C turns to the scholarship. Perhaps the Court's missteps are more understandable in light of the oversights and inaccuracies that plague some of the leading academic authorities in the field. Section C documents those errors through a brief history of the scholarship on removal that brings out its historiographic presumptions. This critique sets the stage for Parts II and III, which present a more accurate account of removal in the early republic.

A. The Removal Revolution in History

On June 29, 2026, the Supreme Court handed down *Trump v. Slaughter*.[21] Overturning decades of precedent, the decision held that the President has "general administrative control of those executing the laws" and found Congress powerless to restrain the President from firing members of once-independent agencies.[22] This, the Court explained, was the original vision of the place of the presidency in the administration embodied in the Constitution. Shortly after the decision, the President of the United States boasted on social media that he had been handed "the Greatest Increase in Presidential Power in the last 100 years."[23]

---

[21] 609 U.S. __ (2026).

[22] *Id.* at __ (slip op. at 2).

[23] Ella Lee, *US Supreme Court Checks Donald Trump's Power Even as It Bolsters Presidency*, FIN. TIMES (July 1, 2026), https://www.ft.com/content/2ac7b4ec-aa72-4893-9713-87968da038a0.

Slaughter capped a stunning jurisprudential reversal. Not twenty years ago, the notion that Congress was constrained in its choice of how to structure agencies would have seemed unserious. No prior Supreme Court, with one possible exception, would have agreed with *Slaughter*'s reasoning. For the great bulk of American history, the courts were silent on the President's putative power to remove. They thought that the Constitution left Congress with a free hand to structure the government as it wished.

This Congress-first judicial sensibility traces back to the Marshall Court. In 1803, *Marbury v. Madison* famously rejected President Jefferson's non-appointment of a justice of the peace as illegal, finding that Marbury enjoyed his office as a matter of law and that the President did not have any contravening power.[24] Thirty-six years later, in *Ex parte Hennen,* the Court reiterated what two of us have called, in other work, the primacy of the statute, holding that removal would follow appointment unless there was legal language to the contrary.[25]

The primacy of the statute received its fullest jurisprudential exposition at the end of the 19th century. As the U.S. economy developed and the government expanded, a concomitant spike in officer firings summoned the Court to grapple with the removal power in a sustained way. Between 1886 and 1903, it heard several removal cases involving a range of officers, including navy cadets, US attorneys, territorial judges, and customs officials. [26] The Court upheld the firings in all but one case. But at each turn, it reasoned on statutory grounds. *Perkins*, from 1886 put it simply: "We have no doubt that [Congress] may limit and restrict the power of removal [of inferior officers] as it deems best for the public interest."[27]

Judicial deference to statute was briefly threatened in 1926, in *Myers v. United States*, although just how far that case reached is debatable, and in any case its reach was quickly restricted. Decided by President-cum-Chief Justice William Howard Taft, *Myers* was the first case ever to identify an

---

[24] Marbury v. Madison, 5 U.S. 137, 167 (1803).

[25] *Ex parte* Hennen, 38 U.S. (13 Pet.) 230 (1839); *see* Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief:* Myers *and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2195–202 (2023).

[26] United States v. Perkins, 116 U.S. 483 (1886); McAllister v. United States, 141 U.S. 174 (1891); Parsons v. United States, 167 U.S. 324 (1897); Shurtleff v. United States, 189 U.S. 311 (1903).

[27] *Perkins*, 116 U.S. at 485.

"unrestricted" presidential power of removal under the Constitution.[28] That aspect of its holding was contested at the time, however, and how far it was to reach is still not clear. (Specifically, *Myers'* "unrestricted" removal power seemed on its face to threaten non-Article III judges and the civil service alike, although Taft claimed it worked "no practical interference" with them.[29])

Whatever *Myers* meant, its reach was clarified in *Humphrey's Executor* just nine years later, which unanimously upheld for-cause removal protection for FTC commissioners and restored the primacy of the statute.[30] "We think it plain," wrote Justice Sutherland, "that illimitable power of removal is not possessed by the President" and that Congress's authority "in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted[.]"[31] Sutherland's *Humphrey's* opinion garnered all of the Justices who had been on the Court when *Myers* had been decided—including four who had been in the *Myers* majority.[32]

Humphrey's Executor validated what had been the dominant rule before *Myers* and which, perhaps, *Myers* had not sought to displace. That it was unanimous and included a majority of the *Myers* majority made its holding that much more compelling. For the rest of the twentieth century, the law of removal was governed by the *Myers-Humphrey's* settlement—itself unanimously upheld again in 1958 in *Wiener*[33]—under whose aegis some 46 independent agencies or offices were established and upheld from 1935-2010.[34] Congress could design

---

[28] 272 U.S. 52, 152 (1926).

[29] *Myers,* 272 U.S. at 135. *Myers* also contained language about officers vested with "duties so peculiarly and specifically committed to [their individual] discretion," suggesting that while these should exercise their independent judgment in performing their duties and the President could *not* countermand them, yet also that if their work displeased the President, he could fire them. On *Myers*'s reach, see Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353 (1927). On the contradictions within *Myers*, see Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of* Myers v. United States, 45 J. SUP. CT. HIST. 167 (2020).

[30] 295 U.S. 602, 627-629 (1935).

[31] *Id.*

[32] Beau J. Baumann & Jed H. Shugerman, *Quasi-Judicial: A History and Tradition*, COLUM. L. REV. (forthcoming 2026).

[33] 357 U.S. 349, 356 (1958) (upholding that settlement).

[34] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 547 (2010) (Breyer, J., dissenting) (appendix collecting independent agencies). An additional two,

the government any way it wished, more or less, so long as the President retained the power to remove a narrow class of purely executive officers.

Yet, by the '80s, signs of change were evident. The incoming Reagan Administration used the removal power assertively, imposing an immediate hiring freeze upon taking office, and firing some 15,000 officers by the end of December 1981. Simultaneously, the Department of Justice began to actively contest the lawfulness of removal restrictions.[35] The strategy came to a head in *Morrison v. Olson* (1988), which challenged the constitutionality of a special independent prosecutor investigating the Reagan EPA. The Supreme Court vindicated Congress's creative powers to draw up agencies and officers, as usual, but its unanimity fractured. Justice Scalia, then a young Turk appointed by the very administration whose project he adjudged, wrote a solo dissent arguing that Article II gave the President far-reaching control over the government. The Constitution vests in the President, not "some the executive Power," he wrote, "but all of the executive power."[36]

While Scalia won no other votes for his position in 1988, his view presaged a conservative shift on the bench on the question of removal. Over the next years, Republican administrations appointed judges who shared Scalia's jurisprudential commitments.[37] When, two decades later, Scalia-style conservatives achieved a majority on the Supreme Court, Scalia's dissent had its revenge.

The replacement of the primacy of the statute (and so Congressional supremacy) with the centrality of Article II (and so presidential supremacy) happened with remarkable speed. In 2010, the Court struck down a removal provision for the first time in 90 years, holding unconstitutional a double layer of insulation for an oversight accounting board housed in the SEC.[38] Justice Stephen Breyer's dissent presciently worried

---

the Federal Reserve Board and the Federal Trade Commission, were established in 1913 and 1914.

[35] John A. Dearborn, *Contesting the Reach of the Rights Revolution: The Reagan Administration and the Unitary Executive*, 39 STUD. AM. POL. DEV. 83, 98–101 (2025).

[36] Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

[37] Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2141–42 (2024).

[38] *Free Enter. Fund*, 561 U.S. at 492.

about what the case might portend, but his warning went unheeded.[39]

Ten years later, as Breyer neared retirement, the Court began the demolition job he had predicted. It muzzled a single-headed independent consumer protection agency, finding its structure impossible to square with the exceptions of *Humphrey's/Morrison,* given the significant power it wielded.[40] The next year, the Court extended that result to a lesser agency that did not wield significant power.[41] In the same week, the Court also held that patent judges were exercising power inconsistent with their status as inferior officers because their decisions were unreviewable by a politically-appointed superior.[42] The Court explained that democratic accountability required all officers wielding executive power to be part of a "clear and effective chain of command" running up to the President.[43] The days of legislative power over officeholding seemed to be coming to an end.

President Trump's mass firings in the spring of 2025 and the resulting glut of removal cases gave the Court the opportunity to consolidate its revolution. Over the course of one year, the Court addressed whether the President acted lawfully in removing officers in violation of a statute multiple times. In quick succession, it considered whether the President could fire commissioners at the FTC, the NLRB, and the Federal Reserve Board of Governors, with cases involving other officers still working their way through the court system. In all but one of the cases, it found for the President. In none of the cases was its reasoning statutory, however.

The departure from earlier rulings and methods could not be more dramatic. Under the regime of statutory primacy and deference to Congress that had governed removal law before 2010, these would have been easy cases: the removals would have been illegal. But the Court's post-2020 rulings indicated that removal law had changed dramatically. In place of statutory primacy and Congressional supremacy, the Court had embraced presidential supremacy and constitutionalized

[39] *Id.* at 514, 540–41 (Breyer, J., dissenting).
[40] Seila Law v. CFPB, 591 U.S. 197, 218-32 (2020).
[41] Collins v. Yellen, 594 U.S. 220 (2021).
[42] United States v. Arthrex, Inc., 594 U.S. 1, 23 (2021).
[43] *Id.* at 11 (quoting *Free Enter. Fund*, 561 U.S. at 498).

administrative structure.[44] When the Court's decision in *Slaughter* came down, holding that no agency exercising "executive power" could be insulated from presidential firing, it was, however transformative, not a surprise to most court-watchers.[45] In the span of just six years, the Court had completed a revolution in removal law.

B. Historical Argument in Removal Law

To justify its removal law revolution, the Court has searched for compelling sources of legal authority. Since it has held that the President can remove officers even in violation of a statute, the Court needs a constitutional foundation for its jurisprudence. But the Constitution says nothing directly about the removal power.[46] Faced with this silence, the Court and its intellectual allies have sought to ground the removal power in three alternative sources, all historical, that are supposed to carry constitutional significance[47]: (1) the intellectual and legal models used by the Framers, including state constitutions; (2) a putative pro-removal consensus at the Founding and in its immediate aftermath; and (3) practice, which supposedly reveals that presidential removal of officers on political grounds was an accepted tool of policy control. This reliance on historical evidence makes the Court's approach to removal law unusually dependent on what removal in the early republic actually looked like.

Over the last few years, a large body of scholarship has arisen challenging all three pillars on which the historical case rests. In particular, it has shown that Unitarians on the bench and in the academy exaggerate the singularity of the Framers' intellectual inspirations, misstate the early consensus on removal, ignore a wide range of early republic removal statutes and practices, and make invalid assumptions about how removal operated.

Begin with the Framers' intellectual and legal models. Justice Scalia's *Morrison* dissent, the modern UET manifesto,

[44] *See generally* Andrea Scoseria Katz, *Separation-of-Powers Lochnerism*, 94 FORDHAM L. REV. 833 (2025).

[45] Trump v. Slaughter, 609 U.S. __ (2026); Trump v. Cook, 609 U.S. __ (2026).

[46] Excepting impeachment, which was rejected by the First Congress as the exclusive path of removal.

[47] *C.f.* Jed H. Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022) (discussing three "pillars" of the originalist theory of presidential removal).

advanced an influential view of original intent vis-à-vis the presidency that undergirds the whole removal revolution. As he put it: "The founders conspicuously and very consciously declined to sap the Executive's strength in the same way they had weakened the Legislature: by dividing the executive power."[48] Scalia and his successors rely on an intellectual history in which the Framers intentionally rejected the weak governors of the thirteen states' post-independence constitutions and boldly constructed a new executive with a single power indivisible by statute.[49] After Scalia's clarion call, a body of originalist scholarship arose using history to support a similar vision.[50]

Recent scholarship has challenged this intellectual history, however, by showing that none of the models available to the Framers would have necessarily included an indefeasible removal power. So, for example, one strain of UET argument has rooted the President's ability to remove in some residue of power thought to exist by analogy with the British monarch. But recent research has shown that this is not a good foundation for UET in general, or an indefeasible removal power in particular, because the king did not possess many of the attributes Unitarians would attribute to the President, including an unlimited removal power[51] or a prerogative power that might include removal.[52] This is not to mention that whether the king can be taken as a model for the presidency remains a controversial claim.[53]

---

[48] 487 U.S. 654, 698-99 (1988) (Scalia, J., dissenting).

[49] *See generally* CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY (1923) (the progenitor of this account).

[50] For examples of post-Scalia scholarship along these lines, *see* CALABRESI & YOO, *supra* note 9; MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 11 (2020); Bamzai & Prakash, *supra* note 8; Michael D. Ramsey, *Presidential Power and What the First Congress Did Not Do*, 99 NOTRE DAME L. REV. REFLECTION 47 (2023); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93 (2020).

[51] *See* Jed Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMAN. 125, 128–29 (2022); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 31 (2021); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 202, 204–05 (2021).

[52] Caleb Nelson, *Must Administrative Officers Serve at the President's Pleasure?*, DEMOCRACY PROJECT (Sep. 29, 2025); *see also* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1172–73, 1224–28 (2019).

[53] For the pro-unitary version, see MCCONNELL, *supra* note 54; ERIC NELSON, THE

Another strain of UET argument has sought to ground a removal power in the President's Article II duty to "take care" that the laws are faithfully executed. This requires reading the Take Care Clause as a grant of power. But recent scholarship has established that this language parallels other officers' oaths, including offices as lowly as town constable or "inspector of flax and hemp," suggesting that the Clause was a device to limit executive discretion, not expand it.[54]

Removal is sometimes said to be an implied attribute of executive power. But with so much variety in the types of executives that existed before the Revolution, in the Colonies and the United Kingdom, and in the thirteen states after the Revolution, we cannot say that the Framers worked with a single model of executive power that necessarily included removal. The Framers had diverse intellectual inspirations, historical knowledge, and professional experience and their ideas of executive power varied, as well.[55]

The second historical pillar of UET—a supposed pro-removal consensus at the Founding and its aftermath—seems to trace its origins to Taft's opinion in *Myers*.[56] There, Taft insisted that the Decision of 1789 had settled the removal question and was subsequently ratified by the "acquiescence and long practice of all the branches of the Government."[57] The claim remains a commonplace of the Roberts Court's removal jurisprudence and reappears in much UET scholarship.

Taft's conclusion has never been accepted by scholars, however. Even in its time, they argued that *Myers* obscured as much as it illuminated.[58] Critically, it flattened a long history of

---

ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING (2014). For criticism, see Mortenson, *supra* note 56; Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020); Shugerman, *supra* note 55.

[54] *See* Andrew Kent, Ethan Leib & Jed Shugerman, *Faithful Execution and Article II,* 132 HARV. L. REV. 2111, 2117–18 (2019).

[55] *See, e.g.*, MCDONALD, *supra* note 7, at 178–80; JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 244–45 (1996); Andrea Scoseria Katz, Noah A. Rosenblum & Jane Manners, *Disagreement and Historical Argument or How Not to Think About Removal*, 58 U. MICH. J.L. REFORM 555 (2025),

[56] Bamzai & Prakash, *supra* note 8, at 1758.

[57] Myers v. United States*,* 272 U.S. 52, 152 (1926). For *Myers*'s importance to the current Supreme Court, see Trump v. Slaughter, 609 U.S. __, __ (2026) (slip op. at 16) ("While *Myers* was perhaps our best word on the subject, it was not our last")

[58] *See Slaughter*, 609 U.S. at __ (slip op. at 29) (Sotomayor, J., dissenting). As a piece of history, *Myers* received nearly immediate criticism. *See* George B. Galloway, *The Consequences of the Myers Decision*, 61 AM. L. REV. 481, 491 (1927); EDWARD S. CORWIN,

conflict. Rather than settlement, the actual history of removal has involved periodic contestation between Congress and the President.

This contestation is coeval with the Republic itself. The inaptly named Decision of 1789 was a robust, five-day debate on the House floor over whether the President should be able to remove Cabinet secretaries.[59] Whatever the ensuing vote may have decided—and recent scholarship questions whether it can be read to have decided anything at all on removal[60]—Congress re-inserted the Senate into personnel decisions with the Four Years Law of 1820. Famously, and soon thereafter, the Senate censured Andrew Jackson for his promiscuous, politically motivated firings and re-opened a removal power debate in 1834-1835. The House and Senate enacted another Tenure of Office Act in 1867, and impeached (and nearly convicted) President Andrew Johnson for violating it. Even as subsequent Presidents asserted various removal powers—Grover Cleveland's mass firings in 1886; Woodrow Wilson (or was it Edith?)'s dismissal of postmaster Frank Myers[61]; FDR's invalidated attempt to remove Commissioner Humphrey; Dwight Eisenhower's reforms to the civil service and attempted firing of a War Claims commissioner,[62] and so on—Congress hardly acquiesced. As a historical matter, contestation, not settlement, appears to be the "general rule" of removal.[63]

The third pillar—practice—rests on historical inaccuracies, as the remainder of this Article will show. UET has always relied on removal as a proxy for control. The Roberts Court's removal revolution has elevated presidential control of government into a fundamental constitutional principle and connected it to the Constitution's democratic commitments. The

---

THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION 3 (1927). In the present day, see Katz & Rosenblum, *supra* note 29.

[59] *See* Jed Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023); Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 63 AM. J. LEGAL HIST. 229 (2023).

[60] Shugerman, *supra* note 63, at 753–54; Gienapp, *supra* note 63, at 229, 239–40.

[61] Katz & Rosenblum, *supra* note 29, at 2177–80; PATRICK WEIL, THE MADMAN IN THE WHITE HOUSE: SIGMUND FREUD, AMBASSADOR BULLITT, AND THE LOST PSYCHOBIOGRAPHY OF WOODROW WILSON 22–25 (2023).

[62] Joe Natali, *Presidential Power and Constitutional Public Administration* (unpublished Ph.D. dissertation, [university, year]) (on file with author).

[63] *Slaughter,* 609 U.S. __ (slip op. at 27) ("[W]e have left open the possibility that some functions traditionally handled outside the Executive Branch may not be encompassed by *Myers*'s general rule.")

claim, first introduced into the U.S. Reports by Taft in *Myers*, echoed by Scalia in *Morrison*, and repeated in all the Roberts Court removal cases, is that the Constitution requires that the President control the government to vindicate popular sovereignty, and the President exercises control through the threat of removal. This just is supposed to have been how the Framers and their successors thought the government would work.

Aspects of this argument have come in for criticism by scholars already, usually on theoretical grounds. But the Court's contention is fundamentally empirical. Its underlying assumption is that removal was a key tool of presidential "superintendence" of the bureaucracy.[64] The Court asserts, but never shows, that history bears out its claim.

The Court is wrong. Our study demonstrates that removal was simply not a viable tool of administrative control to realize a policy program. As Part II shows, between 1789 and 1820, Presidents seldom removed officers. When they did, it was generally for-cause. Looking at removal statutes alongside removal practices allows us to reconstruct how political actors in the early republic understood removal. They did not believe it served as a vehicle to enable presidential democracy, but that it was, rather, a feature of the office that helped secure good government, as detailed in Part III. Contrary to the Roberts Court's assertions, historical gloss does not support an indefeasible presidential removal power.

C. Absences and Errors in Historical Scholarship

The Roberts Court's historical errors reflect much of the scholarly literature. Although recent studies have transformed our understanding of the early federal republic, those new works do not have broad currency in law. Instead, law professors and judges have tended to rely on older studies of removal that, while important, are now outdated.[65] Those studies have painted an

[64] *See, e.g.*, CALABRESI & YOO, *supra* note 9; Bamzai & Prakash, *supra* note 8.

[65] FISH, *supra* note 19; Gaillard Hunt, *Office-Seeking During Washington's Administration*, 1 AM. HIST. REV. 270 (1896); Gaillard Hunt, *Office-Seeking During the Administration of John Adams*, 2 AM. HIST. REV. 241 (1897); Gaillard Hunt, *Office-Seeking During Jefferson's Administration*, 3 AM. HIST. REV. 270 (1898); THE WRITINGS OF JAMES MADISON (Gaillard Hunt ed., 1900-1910); CARL E. PRINCE, THE FEDERALISTS AND THE ORIGINS OF THE U.S. CIVIL SERVICE (1977); Bamzai & Prakash, *supra* note 8, at 1777 n.152, 1780 n. 184 (relying on Fish); Trump v. Slaughter, 609 U.S. __, __ (2026)

inaccurate and incomplete picture of how removal worked in the early republic.

The challenge is historiographical. For historians, the study of removal in the early republic has often been connected to political projects of state reform: critiquing patronage, defending the federal state, attacking the party system, and glorifying the Founding Fathers. These goals motivated field-defining work but sometimes led to unjustified conclusions and warped perceptions.

This story begins in the first decades of the modern university system. At the dawn of the twentieth century, a series of historians sought to make sense of the hiring and firing practices of the founding generation. First among them were Gaillard Hunt, then in the process of editing the first major collection of James Madison's correspondence, and Carl Russell Fish, who wrote a series of books on the political and institutional development of the federal government. Both were interested in the origins of the federal system. Hunt studied appointments; Fish studied removals. Both men—especially Fish—were also consumed by a fundamental question of their own time: how to create an effective bureaucratic state.

Like so many other well-educated men in government, business, and universities, Fish concluded that systems of political patronage produced both public corruption and inefficient services. Fish inherited and helped propagate the dominant narrative of the Progressive Era that a spoils system had emerged in the nineteenth century that subordinated good government to party advancement and personal enrichment. While historians would later associate this system with the Jacksonians, there was no such clear distinction a century ago. The only thing that preserved the early republic from outright accusations of corruption was the fact that historians like Hunt and Fish admired the Founding generation and were loath to accuse it of venality.

Fish's study, "Removal of Officials by the Presidents of the United States," was a careful attempt to understand how officials had been removed from office. It was a remarkable accomplishment given the scarcity of resources available to him at the time. But it was never intended to be definitive. Fish's study was a published conference paper. He delivered his

---

(slip op. at 11) (quoting Bamzai & Prakash, *supra* note 8, at 1793).

findings at the annual meeting of the American Historical Association and later published that paper in an expanded form in the Association's *Proceedings*.[66] In addition, the research supporting that study remains elusive. Using the commonplace practices of his time, he provided only the most minimal citation about sources.

Moreover, Fish was not systematic. He defined his terms broadly and inconsistently. His totals collapsed removals by the President with offices eliminated by act of Congress. They also appear to include officers who resigned at the President's request or insistence—most often cabinet members. While these departures might have felt like a firing from the perspective of the former officeholder, from a legal and constitutional perspective they were resignations. That is certainly the way the Senate treated them when considering their successors.

Despite these limitations, Fish's work has assumed outsized significance, especially in law reviews. In the decades that followed, his paper became the go-to source for scholars attempting to understand the Jefferson administration in particular and federal removal in general. Those initial citations were themselves cited in turn. Even now, recent work on removal often rests, for its empirical findings, on the now aging foundation of one brief publication produced in an antiquated era.[67]

More recent original work on removal has suffered from an additional, different problem: distortion. Starting in the 1960s, historians transformed the study of the Revolutionary era by excavating the Founders' political culture.[68] These new works

---

[66] Carl Russell Fish, *Removal of Officials by the Presidents of the United States*, *in* ANN. REP. OF THE AM. HIST. ASS'N FOR THE YEAR 1899, at 65-86 (1900).

[67] For initial uses of Fish, see EDWARD S. CORWIN, THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION 4 (National Municipal League 1927); James Hart, *The President's Power of Removal*, 21 AM. POL. SCI. REV. 538 (1927); LOUIS W. KOENIG, THE CHIEF EXECUTIVE 412 (Harcourt, Brace & World 1964); BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW (Houghton Mifflin Company 1942). For more recent historians who draw on sources which themselves rely on Fish, *see* DAVID S. BROWN, MODERATES: THE QUIET HISTORY OF AMERICAN DEMOCRACY 139 (Oxford University Press 2024); REEVE HUSTON, THE RIGHT TO VOTE AND THE MAKING OF AMERICAN DEMOCRACY 165 (University of Pennsylvania Press 2023); HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 101 (Farrar, Straus and Giroux 2006).

[68] For landmark studies of early political culture, *see* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (Belknap Press of Harvard University Press 1967); LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY (Cornell University Press 1978); DREW R. MCCOY, THE ELUSIVE

focused on ideological divisions, putting parties and their belief systems at center stage. For these scholars, including the influential Carl Prince, removal was a tool party leaders could use to extend their notions of government and to entrench ideology within the federal workforce.[69]

The animating concern for much of this scholarship was to assess the state of the American state and its relationship to the party system. Unlike scholars of the early republic, who emphasized the importance of seeing the era as fundamentally different from our own, scholars of statebuilding tended to see the early republic through the lens of normative assumptions about what a state should be. They attempted to explain why the United States had not followed the development patterns of other countries. They sought to find the historical roots for America's "incomplete" or "immature" capacities, especially as compared to the states of Western Europe. These scholars attached plenty of blame to the early republic, arguing that the United States did not have a state and that the early advent of democratic politics provided access to resources in ways that pre-empted the call for bureaucratic services.[70]

Because of their focus on partisanship, these studies overemphasized political removals. They often obsessed over Thomas Jefferson, to show how he sought to reduce state capacity. In the process, they collapsed the distinction between removing officials and eliminating offices and treated the

---

REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA (Norton 1980); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (Norton 1969).

[69] SIDNEY H. ARONSON, STATUS AND KINSHIP IN THE HIGHER CIVIL SERVICE STANDARDS OF SELECTION IN THE ADMINISTRATIONS OF JOHN ADAMS, THOMAS JEFFERSON, AND ANDREW JACKSON (Harvard University Press 1964); Theodore J. Crackel, *Jefferson, Politics, and the Army: An Examination of the Military Peace Establishment Act of 1802*, 2 J. OF THE EARLY REPUBLIC, 21, 21-38 (1982); RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802 (The Free Press 1975); Jerry W. Knudson, *The Jeffersonian Assault on the Federalist Judiciary, 1802-1805: Political Forces and Press Reaction*, 14 AM. J. OF LEGAL HIST., 55, 55-75 (1970); Carl E. Prince, *The Passing of the Aristocracy: Jefferson's Removal of the Federalists, 1801-1805*, 57 THE J. OF AM. HIST., 563, 563-575 (1970).

[70] Brian Balogh, *The State of the State Among Historians*, 27 SOCIAL SCIENCE HISTORY, 455, 455-463 (2003); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (Belknap Press 1992); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 19-36(Cambridge University Press 1982); MARGARET WEIR et al., THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES (Princeton University Press 1988).

exceptional period between 1801 and 1803 as if it were representative. These choices warped their scholarship.

This historiographic background helps explain some of the misprisions by the Court and UET scholars. Prince, Fish, and the earlier work on removal could leave a reader with the impression that the early, underdeveloped American state depended on partisan political removals, with Jefferson taken as the representative President. In fact, the early republic was already a complex government with an evolving but distinct set of institutional arrangements. When considered within the full sweep of early republic removals—a frame that neither Prince nor Fish developed—Jefferson appears not representative, but exceptional, and his revolution more limited in its reach than was previously understood.

Our own research joins with more recent studies of statebuilding to challenge many of the assumptions about appointment and removal that characterized the earlier literature. Jefferson's presumed adversarial relationship with government power has not withstood close scrutiny. Nor have claims about the missing early American state. Far from lacking a state or a culture of state support, policymakers and average citizens alike sought and maintained a robust state that established fiscal solvency, conducted a significant foreign policy, fought a series of military conflicts that stretched across the early republic, governed the massive public domain, maintained African American enslavement as it expanded into the West, and accomplished Native American dispossession at a speed that no European empire could match. Jefferson, like the rest of the Republican leadership that dominated American policymaking for most of the early republic, made his peace with extensive state capacity.[71]

---

[71] BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA (Cambridge University Press 2009); MAX M. EDLING & PETER J. KASTOR, WASHINGTON'S GOVERNMENT: CHARTING THE ORIGINS OF THE FEDERAL ADMINISTRATION (University of Virginia Press 2020); PETER J. KASTOR, THE NATION'S CRUCIBLE: THE LOUISIANA PURCHASE AND THE CREATION OF AMERICA (Yale University Press 2004); James E. Lewis, *'The Strongest Government on Earth' Proves its Strength: The Jefferson Administration and the Burr Conspiracy*, in JEFFERSONIANS IN POWER: THE RHETORIC OF OPPOSITION MEETS THE REALITIES OF GOVERNING 199-221 (Joanne B. Freeman & Johann N. Neem eds., 2019); Johann N. Neem, *Developing Freedom: Thomas Jefferson, the State, and Human Capability*, 27 STUD. IN AM. POL. DEV., 1, 1-15 (2013); Gautham Rao, *The New Historiography of the Early Federal Government: Institutions, Contexts, and the Imperial State*, 77 THE WILLIAM AND MARY Q., 97, 97-128 (2020); Leonard J. Sadosky, *How the Jeffersonians*

The rest of this Article shows how removal fit into that state by looking at presidential removal writ large. It supplies a missing empirical foundation for a scholarly literature that has, in effect, spent a century debating the significance of numbers no one has fully verified. In this sense, the field has been looking for the lost keys where the light is.[72] This Article seeks to expand the circle of illumination.

II. THE PRACTICE OF REMOVAL IN THE EARLY REPUBLIC

Current law and scholarship engages with an inaccurate and incomplete picture of removal in the early republic. This is largely a result of inadequate sourcing. Court decisions and scholarly studies have elaborated theories of early republic removal on the basis of a small number of anecdotal cases. As a result their accounts are partial and unrepresentative.

This Part begins remedying this oversight by offering a more complete and systematic account of removal in the early republic. Drawing on data from Professor Kastor's comprehensive study of the careers of federal officers, it tabulates all documented cases in which a federal civil officer whose appointment was subject to senatorial advice and consent was removed between 1789 and 1820. It shows that, contrary to contemporary assumptions, presidential removal was rare, rarely political, and not a significant tool of presidential personnel management. Far from a vector for realizing a partisan political agenda or channeling the democratically licit popular will into government action, it was a tool to promote efficient and effective public administration.

Before exploring these results, we begin with some source criticism. Section A explores the empirical challenges with reconstructing early republic removal practice. Because the early federal state did not engage in systematic recordkeeping, scholars must rely on the often-cryptic and extraordinarily laconic *Senate Executive Journal*. Section B then turns to the data. It uses entries from the *Journal*, supplemented by other

---

Learned to Love the State: Consumption, Finance, and Empire in the Madison Administration, in JEFFERSONIANS IN POWER: THE RHETORIC OF OPPOSITION MEETS THE REALITIES OF GOVERNING 148-177 (Joanne B. Freeman & Johann N. Neem eds., 2019); Rachel St. John, *State Power in the West in the Early American Republic*, 38 J. OF THE EARLY REPUBLIC, 87, 87-94 (2018).

[72] David M. Driesen, *Does a Removal Power Exist?: Joseph Story and Selective Living Organism*, 39 CONST. COMMENT. 1 (2024).

extant sources, to illustrate that, in the early republic, removal was rare, rarely political, and usually for cause. Section C turns to the only notable deviation from that baseline, the small number of partisan removals effected by Thomas Jefferson after the election of 1800. Those removals have taken a disproportionate share of scholarly attention, have been frequently misread, and have distorted our understanding of early republic removal practice.

A word of warning: while this account is, to our knowledge, the most comprehensive attempted, it remains incomplete. As we explain in more detail below, early republic sources and practices have inherent limitations. For that reason, we turn in Part III to a database of office-creating statutes, to try to overcome some of these limitations while providing more legal context for the removal practice this Part describes.

A. The *Senate Executive Journal* and Its Limits

Understanding early removal practice begins with a simple observation: the sources limit what we can know. The federal government did not maintain centralized employment records for much of its early history. The processes of appointment and removal left only the most limited documentary residue. Individual agencies apparently kept no systematized records of removal: none remain extant, and we have no evidence that they used to exist and are now lost.

Even where we know removal happened, it can be challenging to find documentary proof as to why or how officials removed from office were informed that they had been fired. Consider the customs collector, perhaps the most numerous kind of confirmed civil official in the late 18th and early 19th century federal state. Key players in the nation's political economy, customs collectors were the senior officials in the nation's ports of entry. They oversaw the collection of the import duties that were the primary source of federal revenue, making them an attractive mark for bribes from merchant masters hoping to smuggle goods into the United States. They also had a lot of control over the funds they collected, raising the risk of embezzlement. Perhaps for these reasons, customs collectors were the personnel most likely to be removed from civil office during the early republic.

The Treasury Department maintained letterbooks of outgoing correspondence from Secretaries of the Treasury to customs collectors, carefully preserved at the National Archives. Yet those letterbooks, produced in the elegant handwriting of central office clerks, contain not a single letter to an outgoing collector informing him of his removal or a letter to his successor instructing him on how to effectuate the replacement.[73]

Other executive branch sources are equally unhelpful. Commissions to public office make no reference to removal, either as applied to a predecessor or as a possibility to the officeholder.[74] Some federal offices preserved logbooks recording public appointments, but the majority of these were for offices that were not subject to advice and consent, most notably postmasters and clerks.[75]

Legislative sources are more helpful, but not without peril. While nominations and appointments usually became public knowledge, the Senate proceedings in which they were considered did not. Instead, they remained within the Senate. At this time, there was no officially published record of Congressional proceedings. The House of Representatives was more transparent, but not by much. All of this occurred in a context in which privately owned newspapers, rather than publicly commissioned proceedings, generated the printed record of Congressional action. Newspapers produced an active record of the House, far less so for the Senate, and, those newspapers paid scant attention to appointments, let alone removals.[76]

---

[73] GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE (The University of Chicago Press 2016); Letters from the Secretary of the Treasury to Collectors of Customs at All Ports (1789-1847) and at Small Ports (1847-78) (National Archives Record Group 56, Microfilm Copy 175).

[74] COMMISSIONS PERMANENT SEPT. 1, 1789-JAN. 6, 1802 (National Archives Record Group 59). *See generally* Christine Chabot, *The Interstitial Executive*, 52 BYU L. REV. (forthcoming 2027).

[75] Record of Appointment of Postmasters, Oct. 1789-1832 (National Archives ed., National Archives Microfilm Publication M1131).

[76] TERRI DIANE HALPERIN, DANGEROUS TO LIBERTY: THE UNITED STATES SENATE, 1789-1821 (2000) (PhD dissertation, University of Virginia); DANIEL WIRLS, THE INVENTION OF THE UNITED STATES SENATE (Stephen Wirls ed., Johns Hopkins University Press 2004). Even Congressional debate received only limited public distribution. Individual newspapers often covered proceedings in Congress, but with the growth of newspapers in the 1790s fueled by the growth of partisanship, these publications provided vastly different views of Congressional proceedings. Meanwhile, their limited physical space (many newspapers were published weekly or biweekly) meant that Congressional coverage had to be highly selective. Soon after the capital moved to Washington, D.C., in 1800, the D.C.-based *National Intelligencer* became the

The Senate maintained a record of its proceedings but did not disclose it to the public. This was entirely in keeping—indeed was foundational too—with the emerging practice of the Senate to operate in a more private, less transparent manner than the House. It was not until 1828 that the Senate released the details to the public as part of the broader shift from the republican system of politics that so many of the Founders desired to the more democratic system of politics that a growing number of Americans demanded. Duff Green, a private printer in D.C., published the Senate record up to 1828 as *The Journal of the Executive Proceedings of the Senate of the United States of America,* now colloquially known as the *Senate Executive Journal.* Those volumes established the publicly available narrative of the procedural elements of nominations and confirmations.

Yet Green's publication revealed an idiosyncratic record at best. *The Senate Executive Journal* almost always included the outcome of nominations, often detailed the timetable, inconsistently recorded the vote, and rarely provided any details on the discussions that may have ensued within the Senate.[77] In the absence of any centralized documentation of the appointment or removal of federal personnel by the agencies that employed them, this remains the best record we have of "PAS" officers. It is a record that the Senate created by accident, through passive retention rather than active planning. And it was a byproduct of appointment.

Consider the case of Sylvanus Walker. At the start of the 1792 congressional session on March 6, George Washington wrote to the Senate requesting permanent appointments for the 126 revenue inspectors he had appointed during the recess. The Senate took up the matter the following day. The *Executive Journal* contains only the brief statement: "Resolved , That the

---

first newspaper to consistently cover Congressional debate in detail. Other newspapers often reprinted selected materials from the *Intelligencer.* The subsequent owners of the *Intelligencer* eventually compiled these articles and in 1834 began publishing the material as *Annals of Congress,* which retrospectively reconstructed a continuous reproduction of debate in both houses. *See* JEFFREY L. PASLEY, "THE TYRANNY OF PRINTERS": NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC (University Press of Virginia 2001). Note: Find more on the history of *Annals of Congress.*

[77] For a history of the *Senate Executive Journal, see* Library of Congress, Senate Executive Journal, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates 1774 to 1875, https://www.loc.gov/collections/century-of-lawmaking/articles-and-essays/journals-of-congress/senate-executive-journal/.

Senate advise and consent to the appointments conformably to the nominations therein contained."[78] One of the people on that list was Sylvanus Walker, who had received a recess appointment as revenue inspector in South Carolina. Like most recess appointments to low-level offices, there is no extant documentation to indicate the process of his selection or the mechanism of his recess appointment.

When Washington established the precedent for removing an officer confirmed by the Senate, it was late in his term. In 1796, one of Washington's many subsequent nomination letters included the following item: "It having become necessary to remove Sylvanus Walker, Inspector of the Revenue for the Third Survey in the District of South Carolina, I also nominate William Benson to succeed the said Sylvanus Walker, in said office."[79] This brief missive is how we know that Walker was removed. In so doing, Washington incidentally set a second precedent: removal without informing the Senate of the reason why. Yet Walker, like almost everyone else removed from federal office, was in fact removed for cause. In 1792, Daniel Stevens, superintendent of the revenue for South Carolina, had complained to the Treasury Department leadership that Walker was delinquent in reporting accounts, one of the most important tasks of a customs collector.[80]

Between 1792, when Washington made his recess appointments of inspectors, and 1796, when he fired Walker, several of the 126 initial inspectors had left. The reasons for their departures—resignation or death—are known to us now only for the same reason as Walker's: because Washington included the information in his letter nominating their successor. It was in this manner that the *Senate Executive Journal* documented thousands of appointments and departures, whether through death, resignation, or removal. Some nominations arrived in large groups (although few as large as the 126 in 1792), others individually like William Benson, successor to the negligent, removed Walker. The terminology of

[78] *Supra* note xxx, 102-105.

[79] *Id.* at, 208.

[80] Letter from Oliver Wolcott, Jr., Secretary of the Treasury, to George Washington, President of the United States, 14 May 1796, The Papers Of George Washington Digital Edition: Presidential Series 20:140n.1 (Theodore J. Crackel ed., University of Virginia Press 2008).

both the nominations and the Senate proceedings were similarly varied.

Walker was the only civil officer to receive advice and consent who was removed in the entirety of the eight-year Washington administration. This does not necessarily reflect any particular aversion to removal by Washington. Rather, it reflects how the small number of removals during the early republic developed within a broader ecosystem of statebuilding. Between 1789 and 1820, American Presidents submitted 3,654 nominations to the Senate. Of the 1,201 whose departure reasons are known, 344 (28.64%) resigned, 248 (20.65%) had their offices abolished, 217 (18.07%) died, and 204 (16.99%) were appointed to another office. The 67 removals (5.58%) were a distant fifth. The remainder ranged from election to state and federal office to the end of specific assignments (mostly diplomats on special appointments), to a small number who simply moved away. These unpredicted departures left Presidents and agency heads scrambling to identify replacements and get them confirmed by the Senate. In other words, many of these departures, especially the resignations and deaths, were entirely unpredictable, leaving presidents in a lurch to fill positions where finding a successor was a time-sensitive matter. Put simply, presidents could not afford to pile removals onto the numerous stresses on state capacity.[81]

By the time Washington left office, the federal workforce had reached a steady state. During those years, federal employees accumulated the performance histories that could inform a future decision to terminate employment.[82] In contrast to Washington's one removal in eight years, during his one term John Adams removed three officials: commercial officials Vincent Gray (a port inspector in Alexandria, Virginia), John Halstead (who served as both collector and inspector in Perth Amboy, New Jersey),[83] and Secretary of State Timothy Pickering

[81] These figures reflect those people nominated and confirmed before the May 1820 passage of the Tenure in Office Act. In includes only those people who were removed before that date. For those people who were not removed, it includes departure reasons through 1834. This data does not include federal judges because they were not subject to removal.

[82] Peter J. Kastor, *Washington's Workforce: Reconstructing the Federal Government at the Moment of its Creation*, in WASHINGTON'S GOVERNMENT: CHARTING THE ORIGINS OF THE FEDERAL ADMINISTRATION 57-85 (Max M. Edling & Peter J. Kastor eds., 2020).

[83] *Supra* note xxx, 341.

(who Adams fired in 1800 for resisting Adams' call for negotiating a settlement to the Quasi War).[84]

The cases of Sylvanus Walker and Vincent Gray further demonstrate the centrality of *The Senate Executive Journal* and the limits of other sources. Washington's letters of nomination for Walker and Benson (which includes the reference to Walker's removal) are duplicated in the Presidential Series of *The Papers of George Washington,* the definitive documentary collection of Washington's incoming and outgoing correspondence.[85] That collection also includes the letter from Treasury Secretary Oliver Wolcott, Jr., explaining the reasons why Walker's removal was in order. We do not know if there is equivalent evidence for Gray for the simple reason that *The Adams Family Papers* (the massive project under way at the Massachusetts Historical Society) has not published Adams' correspondence from 1798 (the year that Hugh West's appointment to Alexandria produced the record of Gray's removal).[86]

There are some exceptional sources. Thomas Jefferson kept a series of notes on the reasons for some of his removals, listing specific justifications,[87] and his correspondence with Secretary of State James Madison and Secretary of the Treasury Albert Gallatin provides one of the rare moments of dense documentation for removal.[88] But even for Jefferson, removal details dry up after 1802, despite the benefit of the *Papers of Thomas Jefferson* project. And, as we explain more in Section C, Jefferson's removals are atypical and easy to overread.

The post-Jeffersonian presidents have left us no useful information, at least for now. The Presidential Series of *The Papers of James Madison* sheds no light on removals during the

---

[84] *Id.* at, 353; LINDSAY M. CHERVINSKY, MAKING THE PRESIDENCY: JOHN ADAMS AND THE PRECEDENTS THAT FORGED THE REPUBLIC 255-59 (2024).

[85] For a summary of the project, *see* Univ. of Va, The Washington Papers, https://washingtonpapers.org/.

[86] *Adams Family Papers*, MASSACHUSETTS HISTORICAL SOCIETY: ADAMS PRESIDENTIAL LIBRARY, https://www.masshist.org/adams/adams-family-papers.

[87] Thomas Jefferson, Lists of Appointments and Removals with Editorial Note, THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION: MAIN SERIES 33:663-76 (Barbara B. Oberg & J. Jefferson Looney eds., 2008); Jefferson, Notes on New York Patronage, 17 February 1801, THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION: MAIN SERIES, 33:11; Jefferson, Notes on New Jersey Patronage, ca. 5 March-before June 1801, 33 THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION: MAIN SERIES, 183; Jefferson, Notes on South Carolina Patronage, ca. March-November 1801, 33 THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION: MAIN SERIES, 513.

[88] Letter from Albert Gallatin to Thomas Jefferson, 10 August 1801, 33 THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION: MAIN SERIES, 11.

Madison administration. Meanwhile, the administrations of James Monroe and John Quincy Adams, twelve crucial years of administrative development, are a documentary black hole. As with the publication of his father's correspondence, *The Adams Family Papers* have made limited progress on the materials of John Quincy Adams' presidency. And James Monroe stands alone as the only early President whose correspondence was not included in the Founding Fathers papers projects that began in the mid-twentieth century. Although Monroe is now the subject of an editorial project, it has published a selection of his correspondence rather than a comprehensive archive, and even that material has only recently reached the start of his presidency.[89] Someday we may know more about Adams and Monroe.

In the absence of additional evidence, the proceedings of the Senate as recorded by the *Senate Executive Journal* provide the most consistent record of removal. It bears repeating that removal as recorded in the *Journal* was always connected to appointment. This apparently reflects a key feature of removal practice in the early republic: removal was incident to appointment not just in a formal, legal sense, as discussed in Part III, but in a practical one too. In the vast majority of cases, officials were removed to make way for a successor. They were not removed in order to eliminate a position; presidents left that for Congress.

These details of removal only make sense within the highly specific culture of office-creation and office-holding in the early republic. Offices subject to advice and consent were created through two general processes: (1) legislative creation, which usually established a specific office in a specific location, often with specific terms of service and (2) ad-hoc creation, in which the President nominated an official for a specific task and

[89] Univ. of Mary Washington, The Papers of James Monroe,, https://academics.umw.edu/jamesmonroepapers/. The organization of these volumes dates back to the 1940s and 1950s, when a series of editorial projects took form to document the American founding. The original collection of Founding Fathers were George Washington, Thomas Jefferson, Ben Franklin, John Adams, and James Madison. The list eventually grew to include the entire Adams family as well as the correspondence of Alexander Hamilton. Meanwhile, similar projects using the same exacting editorial practices but existing outside the self-defined list of "Founding Fathers" began publishing the writings of antebellum political figures like Henry Clay and John C. Calhoun. James Monroe was never the subject of a major stand-alone project until the very recent development of *The Papers of James Monroe*.

Congress' role was limited to creating the agency in which that person served, confirming the nomination through a Senate vote, and authorizing salary and expenses through the Congressional budget process. Judicial appointments (which were limited in number) and treasury appointments (which were far more numerous) fell into the first category. Federal legislation established spatial jurisdictions and job duties for officials serving in district courts, customs collection, and territorial administration; created offices with specific titles and duties; and established the terms of service for those offices. In sharp contrast, hundreds of diplomatic officials (the small number of ministers and the much larger number of consuls, chargés d'affaires, secretaries of the legation, etc.) were appointed as needed, with the President sending individual nominations whenever he and the Secretary of State thought necessary.

When offices in category 1 became vacant, Presidents appointed replacements. When offices in category 2 became vacant, Presidents considered themselves entitled to reappoint or not, which would eliminate the office. Vacancies in ad-hoc offices occurred for a broad range of reasons—the largest single reason was resignation, followed by the grim statistic of death in office—but Presidents had a variety of means to create vacancies, too, including removal, recalling diplomats, or appointing office holders to other positions. The *Senate Executive Journal* rarely records anything about these departures except for the simplest of terms: resigned, deceased, removed, etc. And the brevity of those terms speaks volumes to the operational realities of governance.

The Article seeks to overcome these limitations as best it can by situating its findings within the context of patterns of state capacity revealed by the more than 38,000 records of federal employment in *Creating a Federal Government.*[90]

[90] The data on removals constitutes part of a larger subset of the data in *Creating a Federal Government.* Generating the content for that project included capturing all nominations recorded in the *Senate Executive Journal.* Nominations and appointments were gathered manually by a series of research assistants at Washington University in St. Louis working with the SGML-tagged transcription produced for *A Century of Lawmaking for a New Nation,* the digital project created by the Library of Congress. This data included both details on individual appointments and, whenever recorded, departure reasons. Data validation consisted of repeated reviews of the *Senate Executive Journal,* as well as a final review and comparison against other sources conducted by

Likewise, we have explored what qualitative evidence does exist in the published correspondence collection and government agency microfilm collections. As a result, the analysis that follows represents the most comprehensive dataset that has yet been assembled to understand removal in particular and federal employment in general.

Even this picture is partial. Not all civil officials underwent advice and consent, nor were they the only people who lost their jobs. For example, close to 10,000 men and women served as postmasters from 1789-1820, but they were appointed directly by the Postmaster General and there is no reliable record of the reasons for their departures. Likewise, clerks were hired by and served at the discretion of their immediate supervisors. These and similar offices had no statutory guidelines and requirements concerning removal from office.

A study of officials who underwent Senate confirmation can nevertheless shed important light on critical questions of removal and the place of the President in the early American state. First and foremost, these officers were nominated directly by the President, and the combination of presidential nomination and Senate confirmation provides the clearest view of the roles these two institutions assumed on the appointment and removal of officers. Second, they are the only cohesive data source that provides apples-to-apples comparisons across the early republic. Third, they have been the basis for most of the prior attempts (in academic journals and legal arguments alike) to analyze how the Founders understood removal, establishing the analytical conversation that connects this article both to prior scholarship and to legal decisionmaking. Fourth, and no less important, these appointments included all of the positions that would now fall under the contemporary category of "officers." While presidents submitted the names of entire classes of employees who might not now qualify as "officers" of the government, they specifically excluded clerks, postmasters, and other personnel who, even if they operated independently, where in clerical, subordinate roles without any supervisory responsibilities of their own. In other words, while this sample set does not cover all federal personnel, it does include everyone we might think of an officer, even today.

Peter Kastor. A final AI-driven search for removals was conducted using Google Gemini to review the transcriptions of the *Senate Executive Journal.*

B. Presidential Removal Practice: Rare, Rarely Partisan, and Usually For Cause

Between 1789 and 1820, the Senate received 3,654 nominations to federal civil office. These ranged from new candidates to reappointments to promotions and reassignments. Prior to the Tenure of Office Act of 1820, only 66 civil officers were removed. Given that most officials continued in office indefinitely and served until death or resignation, this is a strikingly small number. Removal was not common.

In those cases where the documentary record provides any information on the removal, removed officers overwhelmingly lost their jobs for cause, usually drunkenness, incompetence, neglect or corruption.[91] Officers were rarely removed for partisan reasons alone. Indeed, with two exceptions—Adams' Secretary of State Timothy Pickering, who actively tried to sabotage the president's peaceful diplomatic efforts with France, and Thomas Jefferson's removals—a special case discussed more below—our data reveals no cases of removal between 1789 and 1820 in which the President stated explicitly political purposes. Nor was removal a standard tool of presidential personnel management or an ordinary mechanism for implementing a president's policy agenda. Removals were rare and almost always justified through manifest incompetence, neglect, malfeasance, or moral/personal lapses.

Not all of the offices in our sample would be thought to require senatorial advice and consent under current interpretation of the law. Although several offices required advice and consent specifically, Washington assumed that the requirement attached to almost all federal jobs, and he regularly submitted offices that had no explicit statutory requirement for advice and consent to the Senate anyway. This practice began right away, with the Revenue Act of 1789, the first piece of federal legislation to create a large number of federal employees. The text of the act established three offices each in dozens of ports, but made no reference to their appointment or removal, let alone require advice and consent.[92] Nevertheless, Washington sought advice and consent for the new collectors, surveyors, and naval officers. As the number of officials in major

---

[91] All such officers served at pleasure. See Part III, *infra*.
[92] 1 Stat. 29.

ports mushroomed in the 1810s and 20s to include large numbers of port surveyors, presidents switched from submitting all port officers to the Senate to nominating only those officials who were also serving as collectors (in smaller ports, collectors often held multiple positions).[93]

With so many officers to confirm, the approval rate for nominations was extraordinarily high. The Senate confirmed 95.56% of the nominations it received, often in quick order. Nor did this vary much during the period of divided rule from 1801-1803, when the Republicans had won the presidency and held a majority in the House but Federalists retained a slim majority in the Senate. Many confirmations were approved on the day they were received. While some received extensive discussion that demonstrated weak support, they nonetheless advanced. Nominations that were rejected do not follow any particular pattern of office type or (when known) reason for rejection. And there do not appear to be significant regional or agency variations in patterns of appointment or removal.

The vast majority of the men who received these nominations held only one job, some for a year or two and others for decades. Only a very small percentage of these officials experienced removal. The vast majority of them ended their service when they resigned, died in office, were appointed to other offices, or had their offices abolished. Even "resigned" is a complex term. The Senate never used the term "retire" to explain why somebody left office because it was not a commonplace job category in the early republic. The case studies for men who left rich biographical material, especially federal judges, diplomats, and other high-ranking officers, reveals that some of people listed "resigned" did, in fact, end employment for good. But because the biographical information for federal employees is so limited, all these case studies do is reveal the complexity behind "resigned." Put simply, we do not know who quit in pursuit of new employment outside the federal government or who was concluding employment for good.

Removals had their own variations. The Senate did not record the reasons for removals, nor did the administration do so in any coordinated or systematic matter. A careful

[93] Still, not all officers went through Senate confirmation. The largest groups of federal employees that never received advice and consent were postmasters, clerks, and enlisted personnel in the military.

examination of the extant documentation of these removals, consisting primarily of the correspondence of early federal leaders, biographical information on removed officials, and the occasional studies of individual removals, reveals that dismissal for cause was the most common reason for removal.

Notably, removal for purely partisan reasons, or to help advance the president's personal political agenda, was not only uncommon, but at least controversial, and perhaps against practice. The precedent-setting Washington refused to do it. John Adams' removal of Timothy Pickering might fit this description, but it is a revealing case in point. By 1800, Adams had discovered that many in his cabinet were sharing private information with and receiving direct instruction from Alexander Hamilton. In addition, Pickering refused to enact Adams's plans for a peace with France to end the Quasi War. Adams fired Pickering in what was a definitively political controversy but for reasons that were also definitively for cause.[94] In addition to the explicit removal of Pickering, Adams also demanded the resignation of Secretary of War James McHenry. From a practical perspective, this was akin to a removal, with the President effecting the departure of an office-holder. But from a legal and constitutional perspective, it was not a removal. Seeking resignation in lieu of removal was not unprecedented. Washington pressured Edmund Randolph to resign as Secretary of State,[95] and James Madison orchestrated or outright demanded the resignation of multiple cabinet members during his administration.[96] Even at the height of Jefferson's removals in 1801-1803, Gallatin suspected that some officials who knew they were candidates for removal would opt to resign rather than face the indignity of being fired.[97]

While Jefferson presents an anomaly, as discussed more in Section C, his break with the "for cause" standard can be exaggerated. Consider the case of Winthrop Sargent, the governor of the Mississippi Territory. In the decades before the Interior Department was created in 1848, federal territories reported to the State Department. Like all territorial governors,

---

[94] CHERVINSKY, *supra* note XX, at 255-59 (2024).

[95] JOHN J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY 329-34 (1974).

[96] J.C.A. STAGG, MR. MADISON'S WAR: POLITICS, DIPLOMACY, AND WARFARE IN THE EARLY AMERICAN REPUBLIC, 1783-1830, at 60-65, 276-77, 290 (1983).

[97] Prince *supra* note 74, at 567.

Sargent served a four-year term, but, in keeping with common practice, he expected the renewal of his commission.

In June 1801, Jefferson's Secretary of State, James Madison, informed Sargent that "The various, and some of them delicate considerations, which at present mingle themselves with the designation of the individual for this purpose, have rendered it expedient, in the judgment of the President, that the station should be filled by another than yourself."[98] This was a tactful and indirect way for Madison to tell Sargent that he had been fired. The administration already had a replacement in mind: Tennessee Congressman—and loyal Republican—William C.C. Claiborne.

Sargent interpreted his removal as straightforwardly partisan. He inveighed against the injustice in a pamphlet entitled *Political Intolerance, or The violence of party spirit.*[99] But whatever partisan sentiment may have driven his firing, the administration saw this as a removal for cause. Sargent had long been a lightning rod for controversy, first in the Northwest Territory (where he had served as territorial secretary) and later in Mississippi (where John Adams had appointed him as territorial governor in part from the hope that his departure would reduce tensions in the Northwest).[100] Sargent had even been the subject of a Congressional investigation, in which a House committee reported that his mismanagement had fostered widespread discontent both with him personally and with the territorial government in general.[101]

Sargent's case was unusual because his was one of the few offices with a specific term duration. Only senior territorial officials (governors and secretaries) along with judicial

---

[98] Letter from James Madison to Winthrop Sargent, 16 June 1801, 1 THE PAPERS OF JAMES MADISON DIGITAL EDITION: SECRETARY OF STATE SERIES 320 (J. C. A. Stagg ed., 2010)

[99] POLITICAL INTOLERANCE, OR THE VIOLENCE OF PARTY SPIRIT; EXEMPLIFIED IN A RECENT REMOVAL FROM OFFICE: WITH A COMMENT UPON EXECUTIVE CONDUCT, AND AN AMPLE REFUTATION OF CALUMNY; IN A SKETCH OF THE SERVICES AND SACRIFICES, OF A DISMISSED OFFICER (B. Russell 1801).

[100] ANDREW R. L. CAYTON, THE FRONTIER REPUBLIC: IDEOLOGY AND POLITICS IN THE OHIO COUNTRY, 1780-1825 (Kent State University Press 1986); DONALD J. RATCLIFFE, PARTY SPIRIT IN A FRONTIER REPUBLIC: DEMOCRATIC POLITICS IN OHIO, 1793-1821 (Ohio State University Press 1998); John Wunder, *American Law and Order Comes to the Mississippi Territory: The Making of Sargent's Code, 1798-1800*, 38 J. OF MISS. HIST. (1976).Note: I need some more on Sargent

[101] REPORT OF THE COMMITTEE APPOINTED TO ENQUIRE INTO THE OFFICIAL CONDUCT OF WINTHROP SARGENT, GOVERNOR OF THE MISSISSIPPI TERRITORY 19TH FEBRUARY, 1801, COMMITTED TO A COMMITTEE OF THE WHOLE HOUSE, ON MONDAY NEXT (s.n.).

personnel (U.S. attorneys and marshals) had such limits. The rest of the officials to receive advice and consent held their offices both indefinitely and at will throughout most of this period. It was not until 1820 that Congress modified this arrangement, establishing four-year term limits as a background rule for many offices.

Yet Sargent's case was like most other removals whose causes we know in that, whatever partisan reasons might have been lurking in the background, they were cloaked behind plausible allegations of ordinary cause. This was especially true where commercial or diplomatic agents threatened to undermine the federal government's broader policy goals and threatened stability. When Madison became President, he removed Joseph Ray, the consul in Pernambuco, Brazil, because local authorities opposed him.[102] Monroe removed Indian agent David Byrdie in 1821 for participating in illegal slave trading with the Creek villages and for supporting others to do so on the porous boundaries of southwestern Georgia.[103] Monroe removed Florida territorial district attorney Edgar Macon for judicial misconduct,[104] and he removed Missouri public land surveyor William Rector after his brother killed a man in a duel. These are just some of the examples of the for-cause reasons given for what might otherwise have been political removals. [105]

Looking at these removals all together tends to corroborate Professor Leonard D. White's old observation "that the power to remove was confined to cases of moral delinquency."[106] Although the President was understood to

---

[102] Digby A. Willson, *American Consulate General at Rio de Janeiro*, 4 THE AM. FOREIGN SERVICE JOURNAL, 404 (1927).

[103] *RESOURCE GUIDE: "The African Case"*, Georgia Archives, *available at* https://www.georgiaarchives.org/assets/documents/research/african_case_resource_guide.pdf; ANDREW C. ISENBERG, THE AGE OF THE BORDERLANDS: INDIANS, SLAVES, AND THE LIMITS OF MANIFEST DESTINY, 1790-1850, at 153-55(The University of North Carolina Press 2025); CLAUDIO SAUNT, A NEW ORDER OF THINGS: PROPERTY, POWER, AND THE TRANSFORMATION OF THE CREEK INDIANS, 1733-1816 (Cambridge University Press 1999).

[104] Letter from William P. Duval to James Madison, 14 November 1826, 4 THE PAPERS OF JAMES MADISON DIGITAL EDITION: RETIREMENT SERIES 170n.1, (J. C. A. Stagg ed., 2010)

[105] Larry Caldwell, *Selling America: The General Land Office and the Rector-Conway Family Surveying Dynasty Part II*, AMERICAN SURVEYOR, https://amerisurv.com/2021/06/20/selling-america-the-general-land-office-and-the-rector-conway-family-surveying-dynasty-part-ii/ (2021).

[106] LEONARD D. WHITE, *The Jeffersonians: A Study in Administrative History, 1801-1829*, at 381 (1951).

possess a removal power, both Federalist and Republican presidents agreed that it was not a viable tool for general administrative control. The result of early presidents' practice of infrequent removal almost always for cause was a highly stable federal service: some officers retained their positions for their whole lifetime and even passed their title to their sons.[107]

C. The Jeffersonian Anomaly

The elephant in the room in any discussion of early federal removals are the forty-seven removals from 1801-1803 instigated by Jefferson as President. The Republican opposition came into power in 1801 intent on overturning the policies of the Adams administration and replacing Federalist officeholders. Pre-election planning had been limited. Aaron Burr's last-minute decision to seek the presidency in his own right postponed the conclusion of the presidential election until the end of a protracted and bitter series of votes in the House of Representatives. Jefferson did not know for certain that he had been elected President until February 17, 1801, little more than two weeks before his inauguration.

Jefferson had a personal desire to remove Federalists in certain circumstances. Meanwhile, he was under intense pressure from local Republican leaders—the party mobilizers who had helped put him in office—to remove the Federalists in their areas. Indeed, if he had satisfied all these local politicos, Jefferson would have removed hundreds of officers.[108] In the end, this is not the path he followed, opting instead for a more surgical approach targeting certain specific individuals and office types.

Beginning in the spring and summer of 1801, Jefferson threw himself into the empirical measure of the political allegiances of federal employees and the constitutional question of whether he could—or should—remove Federalists. He tasked his private secretary, Captain Meriwether Lewis, with assembling a list of all the officers in the United States Army, using an elaborate notation system to indicate where they stood on the political spectrum.[109] While Lewis conducted his research,

---

[107] *Id.* at 379.

[108] NOBLE E. CUNNINGHAM, THE JEFFERSONIAN REPUBLICANS IN POWER: PARTY OPERATIONS, 1801-1809, at 38-43 (University of North Carolina Press 1963).

[109] List of army officers with Lewis' notations, [after July 24, 1801], THOMAS

Jefferson engaged in an extended conversation over how removal might take place. His principal interlocutors were James Madison and Albert Gallatin. Newly confirmed as Secretary of State and Secretary of the Treasury, respectively, they had been Jefferson's principal allies in orchestrating the Republican ascendancy. Together they discussed whether the President could remove officers simply because they were not members of the president's party.

Gallatin was adamant that the answer was yes in general terms, although he initially recommended caution from concern about the political and administrative disruptions that could ensue. Madison was more measured, questioning both the constitutionality and the wisdom of a partisan purge. The question of removal was never separated from appointment and the specific question of whether party membership should be a requirement for appointment.[110]

Jefferson removed a series of officers indirectly. He enthusiastically signed the Congressional legislation rescinding the Judiciary Act of 1801 (the source of the so-called "Midnight Judges"), removing not only recently appointed Federalist judges but also U.S. attorneys and marshals. He recalled the U.S. ministers to Portugal and the Netherlands without nominating successors, removing them from office too.[111] Jefferson's most famous form of ad-hoc removal was his decision not to have Madison deliver commissions to a series of Justices of the Peace in the District of Columbia, despite their confirmation. One of those justices, James Marbury, took

---

JEFFERSON PAPERS (Library of Congress Digitized Microfilm Collection). *See also* Meriwether Lewis's Classification of Army Officers, 34 THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION: MAIN SERIES 629.

[110] Cunningham, *supra* note 113, at 52-70.

[111] The United States maintained numerous consuls in the two countries. The Jefferson administration added Portuguese diplomacy to the duties of the U.S. minister to Spain. The French invasion of the Iberian Peninsula in 1808 suspended formal diplomatic negotiations with both Spain and Portugal. when the United States re-established minister-level appointments to Portugal and the Netherlands in 1815 and 1819, respectively, they appeared as new offices in the *Senate Executive Journal*. Letter from James Madison to William Vans Murray (June 1, 1801), *in* 1 THE PAPERS OF JAMES MADISON DIGITAL EDITION: SECRETARY OF STATE SERIES, 246, https://rotunda.upress.virginia.edu/founders/JSMN-02-01-02-0322; Letter from James Madison to William Loughton Smith (June 1, 1801), *in* 1 THE PAPERS OF JAMES MADISON DIGITAL EDITION: SECRETARY OF STATE SERIES, 255, https://rotunda.upress.virginia.edu/founders/JSMN-02-01-02-0329.

Madison to court in a case that would transform both federalism and jurisprudence.[112]

Alongside these creative removals, not included in our study, Jefferson removed forty-seven officials outright and nominated successors to replace them. This spate of removals has long consumed historians and occupies a disproportionate place in the literature.[113] It is easy to understand why. They constitute the largest single group of removals in the early republic, and Jefferson explicitly acknowledged to confidantes that his reason for some of them was because of their political affiliation.

Historians have regularly interpreted these removals as a "purge" of known Federalists in particular or Federalist appointees in general. And yet Jefferson's removals actually constituted only a minimal change to the number of Senate-confirmed officials. The federal government employed approximately 576 Senate-confirmed officials when Jefferson assumed office in 1801. Jefferson's spate of removals from 1801-1803 did not remove even 10% of them. The removals did not even constitute a majority of the departures during that period. During those three years, 273 officials left office. The *Senate Executive Journal* does not record a reason for 152 of them, but of the 75 cases that did leave a record of a departure reason, 31 resigned and 15 died. The rest included the standard reasons that were so common throughout the early republic (office elimination, appointment to other offices, etc.).

In other words, while Jefferson may have complained that the federal workforce was filled with Federalists, Jefferson removed only a small portion of them. His condemnation of Federalists rings so loud, and his preservation of Washington and Adams appointees is so quiet, that it is the notion of a partisan purge that has captivated scholars in numerous fields throughout the twentieth and twenty-first centuries.

Scholars also tend to conflate hiring and removal. When it came to future appointments, Jefferson was clear: Federalists need not apply. He initially toyed with the notion that federal patronage should be apportioned in rough accordance with the outcome of the election of 1800. He soon abandoned such high-

---

[112] One of these justices of the peace, William Marbury, challenged this action in court and, in the process, started the chain of events that would precipitate *Marbury v. Madison*.

[113] Prince, *supra* note XX.

minded thinking, however. As vacancies emerged throughout his Presidency, Jefferson opted for Republicans whenever possible.

It is important not to overread the constitutional significance of the removals that Jefferson did effectuate. First, although it is a commonplace assumption that Jefferson's removals were partisan, there is still significant uncertainty about the actual reason any individual was removed. During the Jefferson Administration, there was no consensus that an official was entitled to know why he had been removed. As Gallatin wrote to Jefferson: "It is a delicate question whether when a removal is either political, or, as in this instance, grounded on private immorality, we are bound to give or to advise an approbation of the official conduct of the party, without adding anything explaining the cause of removal."[114] Jefferson usually did not say why he removed, and so we often cannot know for sure.

Second, there is no evidence that Jefferson believed he believed he had an unlimited constitutional power to remove for partisan reasons. Jefferson never once, in public or in private, claimed that the Vesting Clause entitled him to remove federal officials.[115] He was not present at the Constitutional Convention, and his distance from the United States—he served as minister to France from 1785-1789 and did not return to the United States until March 1790—meant that he could comment on the Constitution from a distance, but was not actively involved in either the ratification conventions or the early discussions of the First Federal Congress.[116]

Moreover, in the end Jefferson did not engage in the sort of wholesale purge that Lewis' review of the army might suggest or which Gallatin considered both legal and appropriate. Instead, Jefferson removed a relatively small percentage of officeholders, and he went out of his way to establish non-partisan justifications. In addition to his desire to remove Federalism as an ideology from the federal workforce, Jefferson seems to have been animated by an understanding of public

---

[114] Letter from Albert Gallatin to Thomas Jefferson (July 6, 1801), 34 THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION: MAIN SERIES, 517, https://rotunda.upress.virginia.edu/founders/TSJN-01-34-02-0397.

[115] *Id.* at 54.

[116] Herbert E. Sloan, *The Earth Belongs in Usufruct to the Living*, *in* JEFFERSONIAN LEGACIES 281, 281–316 (Peter S. Onuf ed., Univ. Press of Va. 1993).

office as a good that should be open to everyone. By seizing offices and entrenching themselves in power, the Federalists had corruptly claimed a public good; removing some of those Federalists would open office back up to the people. After he fired a Federalist customs collector in New Haven, Jefferson famously wrote to a disgruntled cohort of New Haven merchants, insisting that as soon as Republicans achieved their "just share" of the administration, he would "return with joy to that state of things when the only questions concerning a candidate shall be, is he honest? is he capable? is he faithful to the constitution?"[117]

Even where a removal might have been motivated by partisan animus, Jefferson and his allies labored to frame it as removal for cause. In many cases, removal for cause may have been a truly sufficient reason, as with Sargent. Of all the removals effectuated over two terms, Jefferson told a protégé, only about fifteen had been for political reasons (and that number would have included offices eliminated by statute).[118] As for the remainder, the very need to disguise the partisan removal of an official who served at will as a removal for cause reveals the importance of the for-cause norm.

Finally, even on the most generous count of partisan removals, they are not representative of removal practice writ large. From 1804-1820, Jefferson and his successors removed fifteen officials, eleven of whom they had appointed themselves. The administration considered these removals to consist largely of firing incompetent officers to promote the integrity of the government.

This helps explain the controversies attendant to President Andrew Jackson's transformation of removal. In 1829-1830, Jackson made a more widespread practice of nominating people either by removing or not renewing their predecessors. Justice Joseph Story, writing in his *Commentaries* in 1833, described an "extraordinary change of system" taking place during the late 1820s and early '30s, in which the President had embraced firings "so extensively" as to bring "back the whole controversy . . . to a severe scrutiny."[119] Removal in the early republic had been part of an "harmonious system," which

---

[117] Letter from Thomas Jefferson to Elias Shipman and Others (July 12, 1801), *in* THOMAS JEFFERSON: WRITINGS, 498–500 (Merrill D. Peterson ed., 1984).

[118] Alvis et al, *supra* at 52-53.

[119] Story, 3 *Commentaries* at 395-96.

depended upon "moderation and forbearance."[120] Jackson's prolific firings inspired Senator Daniel Webster to warn that, "if necessity shall require it," Congress could "reverse the decision of 1789."[121]

Webster's warning drives home the stability of the general presumption that removal was rare, rarely partisan, and usually for cause. Certainly, there was no widely accepted practice of using removal as a tool of partisan control or systematic presidential policy implementation. From Washington until at least the Tenure of Office Act of 1820, and perhaps up to Jackson's presidency, removal was an infrequently used power, which existed primarily to fire officials who the administration considered dysfunctional, incompetent, or so unpopular that they threatened local support for the federal government.

III. THE LAW OF REMOVAL IN THE EARLY REPUBLIC

The practice of removal in the early republic was limited and constrained. Presidents did not fire officials willy-nilly to achieve their personal policy program. Excepting Thomas Jefferson, presidents removed only for what we would now consider cause, and even Jefferson cloaked many of his partisan removals in the language of cause. Removal was not a tool of presidential control.

Removal law reflected this understanding of the removal power. Across the first through sixteenth Congresses, the new republic enacted 403 statutes that created or modified a federal civil office. None of these specified that the President would enjoy a removal power in order to direct the actions of a subordinate, even as some statutes did require subordinates to accept orders from the President or other superiors. And while many of the statutes did include provisions governing removal, they did not reflect a theory of presidential control of government.

This Part turns from practice to law to understand removal in the early republic. It draws from an original, hand-coded dataset of every statute enacted from the start of the

---

[120] *Id.* at 395-96.

[121] Daniel Webster, *Speech on the Appointing and Removing Power* (Feb. 16, 1835), *in* 4 WORKS OF DANIEL WEBSTER 179, 198 (1851).

republic to the Tenure of Office Act of 1820 that created or modified a federal civilian office. The Part argues that removal was understood to be a feature of office, not a constitutional principle. Most statutes said nothing about removal, indicating the existence of background default rules. But the 88 statutes that did include some language on removal employed a wide variety of different designs, varying who could remove, how removal happened, and the reasons justifying removal.

Section A reviews our findings in the aggregate. It also discusses how to interpret the statutory silence on removal that characterizes most officer laws. Section B uses two of the most common early republic offices—customs officials and marshals—to uncover the background legal conventions that statutory drafters apparently drew on. Section C turns to the 88 statutes with specific removal provisions to discuss how they deviated from those background legal conventions and what those departures tell us about the legal status of removal. And Section D pulls the prior sections together to reconstruct a legal theory of removal in the early republic.

To preview our conclusions: Removal was a statutory feature of office, which was used to promote good government. In the absence of specific language, statutes implicitly granted the President authority to remove, with the expectation that he would use that power to remove delinquent officials for cause. But where offices involved trust, expertise, or a heightened risk of self-dealing, good government might counsel alternative removal procedures, including insulation from presidential meddling. This understanding of the removal power departs in important ways from the standard academic and judicial accounts, setting the stage for the scholarly and doctrinal interventions of Part IV.

A. Silence in Statutory Removal Language

As a legal matter, removal has usually been an afterthought. The Constitution, famously, included no language on removal besides impeachment, even though many state constitutions at the time included elaborate removal provisions. Early congressional statutes were similarly silent. Of the 403 statutes enacted between 1789 and 1820, the vast majority—315, or 77.92%—said nothing about removal at all.

Nor was removal discussed much in the legislative history. While the creation of the Departments of War, Treasury, and Foreign Affairs occasioned a long debate about removal—the famous, misnamed "Decision of 1789"—most of the other statutes that created or modified a federal office included no recorded debate about removal provisions.

One might argue that this silence reflects a constitutional settlement. If the Decision of 1789 resolved that the Constitution gave the President an indefeasible removal power with which to control the government, it would stand to reason that subsequent officer-creating statutes could be silent.[122] Removal would be a power granted by the Constitution to the President. Statute could not vary it. There would be little more to discuss.

The historical record challenges this argument. As a threshold matter, recent scholarship has undermined the claim that the Decision of 1789 was a decision at all.[123] Unitarians often point to then-Representative James Madison's comments for the proposition that the Constitution endowed the President with an indefeasible removal power. But, during subsequent debates on the creation of the Department of the Treasury, Madison proposed a term-of-years tenure for the Comptroller, arguing that "[t]here may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government."[124] Even for Madison, the Constitution did not create an indefeasible presidential removal power.

Moreover, voluminous data establishes that early republic political actors simply did not believe that the Constitution required that the President have control over all the government. In the first years of the Republic, Congresses passed and presidents signed numerous laws creating bodies exercising substantial government power staffed by officers the President could not remove. The most famous was the Sinking Fund Commission, a five-member board created in August 1790 with indefinite power to purchase debt up to $400 billion in

---

[122] *See* Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 54.

[123] *See* Shugerman, *The Indecisions of 1789*, *supra* note 63.

[124] 1 ANNALS OF CONG. 612 (1789). To Madison, the office seemed a hybrid: "I do not say the office is either Executive or Judicial; I think it rather distinct from both, though it partakes of each, and therefore some modification, accommodated to those circumstances, ought to take place. I would, therefore, make the officer responsible to every part of the Government." *Id.*

today's dollars.[125] The Commission made "purchasing decisions independently of a unified executive policy."[126] Its five original members included then-Vice President John Adams and Chief Justice John Jay, two officers who could not be fired by the President. The other three Commission members were Secretary of the Treasury Alexander Hamilton, Secretary of State Thomas Jefferson, and Attorney General Edmund Randolph—all men whom "[o]ne would expect . . . to have a clear grasp on the original public meaning of the Constitution."[127] Hamilton, though a defender of a strong executive, had proposed the Commission himself and expressed no doubts about its constitutionality.[128]

The Sinking Fund was not unique; its structure was "commonplace."[129] Other comparable multi-member commissions dealt with everything from planning the seat of government to assessing property values, banking, the mint, patents, canals, turnpikes, the District of Columbia, bankruptcy commissions, the military, and a whole host of treaty commissions including those related to Indian affairs.[130]

In establishing these administrative bodies, Congress "knowingly rejected complete presidential control," writes Professor Chabot.[131] This was not taken as a controversial assertion of power. Presidents agreed to and upheld arrangements protecting commissioners' "impartiality" or "disinterestedness" through structural insulation from removal. And distinguished executive branch officers served on them including, as Professor Nourse has documented, "a 'who's who' of founders over 40 years."[132] Considering the luminaries involved and their proximity to both the drafting of the Constitution and the Decision of 1789, their endorsement of such arrangements is telling.

---

[125] Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 3-4. (2020).

[126] *Id.*

[127] *Id.*

[128] *Id.* at 40–41.

[129] Chabot, *supra* note 175.

[130] Victoria Frances Nourse, *The History of Multi-Member Commissions at the Founding, 1789-1840: New Evidence on Independent Agencies*, DUKE L. J. (forthcoming 2026) (manuscript at *2).

[131] *Id.* at 139.

[132] Nourse, *supra* note XX, at *2. The list includes "Chief Justice John Marshall, Thomas Jefferson, Alexander Hamilton, James Madison and many, many more." *Id.*

Moreover, as described in more detail below, some statutes included provisions simply incompatible with a strong reading of the Decision of 1789.[133] When early republic lawmakers wanted to specify removal provisions, they did, and the provisions they included are difficult to reconcile with a consensus that Article II granted the President an indefeasible removal power.

A more likely explanation for statutory silence on removal is differing drafting conventions. Early republic legislators seem not to have shared modern assumptions about the relationship between statutory language and office design. The best evidence for this reading comes from other idiosyncrasies about early republic statutes creating officers. They are not simply silent on removal but on many other aspects of office design. They just do not contain what a modern reader would expect an officer statute to include.

For example, statutes often created officers by implication. Congress implicitly authorized a series of senior staff positions within federal agencies when it established a pay scale in 1789.[134] The enabling legislation for the State, War, and Navy Departments enumerated only the agency heads and a limited number of people in the central office staff, even though other officers clearly worked in these Departments. U.S. embassies were rarely established legislatively; they often came into being through the ad-hoc appointment of individual officeholders discussed in Part II. The same held true for the nation's consuls and commercial representatives, whose activities were guided only by general provisions for consuls established in 1792.[135]

The Treasury Department was an outlier. It had far more statutory specifications for officeholders than other federal agencies, either as a safeguard against corruption or the appearance of not safeguarding against it. When Congress established first the indirect taxation of import duties in 1789 (the system that remained in place throughout the early American republic) and, later, the periodic direct tax system (maintained sporadically from 1791-1802 and from 1814 into the 1820s), enabling legislation assigned specific offices to spatially

---

[133] *See infra* Part III.B & C.
[134] Act of Sept. 11, 1789, ch. 13, 1 Stat. 67.
[135] Act of Apr. 14, 1792, ch. 24, 1 Stat. 254.

specific taxation jurisdictions. Likewise, most enabling legislation for federal land offices, which were within the Treasury Department, enumerated both offices and office locations. But this was an unusual level of detail.

Most officers had very few legal specifications. The judiciary was the only branch of government with consistent language about terms of office and removal. For officials in the rest of the government, language about appointment, term of office, and removal was varied and often underspecified, at least before the Tenure in Office Act of 1820.

B. Removal Background and Presumptions: Customs Officials and Marshals

Consistent practice seems to have counterbalanced inconsistent statutory language. Whatever the officers, if they were presidential appointees, the President nominated candidates and the Senate considered nominations in more or less the same way. Removal, too, followed a kind of script, with presidents notifying the Senate as discussed in Part II. These practices seem to have gelled into background rules or default presumptions, which informed statutory language and filled in for legislative silence.

Consider the two most common kinds of officers to be removed in the early republic: customs officials and marshals.[136] As discussed in Part I, customs officials were the most numerous. They staffed every major port and helped collect the nascent country's main source of revenue.[137] Marshals were much more spread out and played a different role depending on where they were located. Officially they were just functionaries in the court system. But, as one of the only federal law enforcement officers in the new republic, their practical role could be quite significant. Marshals enjoyed "vague but sweeping enforcement powers," with a "large number of duties" ranging from transporting prisoners to enforcing court orders to supervising census returns.[138] At some times, in some parts of the country, they were the main visible font of federal power.

---

[136] Of the 66 officers removed before the Tenure of Office Act of 1820, 40 were customs officials, and 10 were marshals.

[137] *See generally* Rao, *supra* note 78.

[138] David S. Turk, *A Brief Primer on the History of the U.S. Marshals Service*, FED. LAW. (Aug. 2008), 26. Not all of the marshals' responsibilities were court-related; from

Both customs officials and marshals owed their offices to statutory grants from the first session of the First Congress. On July 31, 1789, Congress passed "An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States," which created the customs offices of collector, naval officer, and surveyor.[139] As with other statutes creating offices in the Treasury Department, it was extraordinarily detailed, specifying not just where customs officers would serve,[140] but their specific responsibilities,[141] chains of succession[142] and of command,[143] the trade lines different officials were to handle,[144] and many other minutiae related to collecting shipping duties. For all its detail, the statute did not specify provisions of appointment or removal, or a term of office, however.

The statute creating marshals looked very different. The office was established by one section of the thirty-five-section Judiciary Act of 1789, which created several other offices as well, including those of Supreme Court Justice, Attorney General, District Judge, and District Attorney. Compared to those other offices, the marshal was easy to overlook. Further underscoring his forgettability, the marshal's responsibilities received only two clauses. The marshal's "duty . . . shall be to attend the district and circuit courts when sitting therein, and also the Supreme Court in the district in which that court shall sit. And to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States[.]"[145] Despite this lack of detail, the marshal did get a term of office—four years—and was made "removable from office at pleasure." Confusingly, the statute did not specify who could appoint or remove marshals, but it did empower marshals to appoint their own deputies, who would be removable "by the judge of the

---

1790 to 1870 they were in charge of administering the census, and they were variously called upon for other civil governance matters.

[139] *See* Act of July 31, 1789, ch. 5, 1 Stat. 29, 36-37.

[140] *See* 1 Stat. 29-35.

[141] *See* §§ 5-9, 1 Stat. 36-38

[142] *See* § 7, 1 Stat. 37

[143] See § 9, 1 Stat. 38. Note that the officials were instructed, by statute, to record their transactions "in such manner and form as may be directed by the proper department, or officer appointed by law to superintend the revenue of the United States."

[144] *See* 1 Stat. 35-36.

[145] Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

district court, or the circuit court sitting within the district, at the pleasure of either."[146]

Going by statutory language alone, then, it would be unclear: (1) who could appoint customs officials and marshals (since it was not specified, even though the appointment process for deputy marshals was statutorily specified), (2) who could remove customs officials and marshals (since it was not specified, even though the actor who held the removal power was statutorily specified for deputy marshals), (3) what standard of removal would apply to customs officials or deputy marshals (since it was not specified, even though the standard of removal was statutorily specified for marshals), and (4) how long customs officials and deputy marshals could serve (since it was not specified, even though a term of office was statutorily specified for marshals). The very fact that statutory language could specify these features but did not in every case suggests that some background rules or default provisions must have governed.

Looking to practice helps uncover not only that default rules did govern officer appointment and removal, but what those default rules were. For appointment, presidents and senators seem to have fallen back on the default provisions in the Constitution. Article II made nomination by the President and confirmation by the Senate the standard mechanism of appointment for "Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[147] The Constitution did not offer explicit criteria for distinguishing "Officers of the United States" from other government functionaries, but that does not appear to have troubled early government actors.[148] From 1789 to 1820, presidents routinely sent nominations for customs officials and marshals to the Senate, which regularly confirmed the nominees (although presidents did make liberal use of recess appointments, which the Senate would subsequently ratify). There is no evidence that anyone in the Senate ever expected anything different, and no President appears to have deviated from this practice.

---

[146] *Id.* The statute also specified that the marshal needed to swear an oath and pledge sureties before entering on his duties. *See id.*

[147] U.S. CONST. Art. II, § 2, cl. 2.

[148] *See* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443 (2018).

Uncovering the background rule for removal is more challenging. Most of the forty customs officials removed between 1789 and 1820 were removed as incident to a subsequent appointment: they lost their job when a successor was confirmed who took their place. Removal as incident to appointment was well established in practice. It was clearly common in the early republic. And while there are limitations to the data that make it difficult to draw comparative inferences with certainty, it seems likely that it was the most common way officers were removed.[149] In any case, it remained a dominant way of understanding the removal power well into the twentieth century.[150]

This supports the inference that removal would require the same mechanism as appointment, and, in particular, that removal from a Senate-confirmed position would require the concurrence of the Senate. Jane Manners and Lev Menand have recently recovered the long history and pedigree of this "Symmetry Rule."[151] Hamilton, in the Federalist Papers, had accepted the symmetry rule, relying on it to reassure Anti-Federalists who feared that the new Constitution gave too much power to the President.[152] No removals of Senate-confirmed officials, he explained, could happen without the concurrence of the Senate, since "the consent of that body would be necessary to displace as well as to appoint."[153]

Yet, once in power, Hamilton and the Federalists governed differently. So did their successor. In the aftermath of

---

[149] Because the *Senate Executive Journals* are our main source, our data suffers from obvious selection effects. As noted earlier, most of the removals we know about come from letters received by the Senate, in which the president nominated someone new and explained that the prior occupant had been removed. That said, by looking at all Senate confirmations across this period, we can identify cases where nominees are confirmed to already existing offices without mention of a prior occupant. Cross-checking those offices with other sources can help uncover what happened to the prior occupant and uncover cases of pure removal. There do not appear to be many.

[150] See the exchange of letters regarding the *Myers* case where Senator Townsend says that the acceptability of Myers' firing can be reviewed during the hearing when Wilson nominates Myers' successor, *cited in* Katz & Rosenblum, *Becoming the Administrator-in-Chief*, supra note XX, at 2180-81 (2023).

[151] *See* Jane Manners & Lev Menand, *The Law of For Cause Removal*, YALE J. ON REGUL. (Mar. 24, 2026), https://www.yalejreg.com/nc/the-law-of-for-cause-removal-by-jane-manners-and-lev-menand/.

[152] *See* Jane Manners & Andrea Scoseria Katz, *"Lost to History": Uses and Abuses of the Past in Slaughter and Cook*, JUST SECURITY (July 10, 2026), https://www.justsecurity.org/145132/lost-history-slaugther-cook-scotus/; THE FEDERALIST no. 77 (Alexander Hamilton).

[153] *Id.*

the creation of the first Departments—that is, after the "Decision of 1789," such as it was—Presidents removed Senate-confirmed officers without seeking Senate approval, and Senators did not object.

Consider, for example, the case of Aaron Dunham, onetime customs Supervisor for the District of New Jersey. Washington had appointed Dunham to his role in March 1791.[154] Ten years later he was still in his position. In between, complaints against him had piled up, especially from Republicans. By May 1801, a congressman was calling for his investigation and the Jefferson administration was debating his future. Jefferson removed Dunham from office unilaterally for "drunkenness and profligacy" in June 1801, and his successor was not confirmed by the Senate until six months later.[155]

No one seems to have doubted the validity of Dunham's removal. Yet Dunham was removed from his position, at least temporarily, without the concurrence of the Senate. There is no record of any Senator objecting to his successor's confirmation on the grounds that Dunham had been improperly removed. And, while removed officials did occasionally complain that their removals were improper, we are not aware of any remonstrances from the early republic on the grounds that an official was removed by the President alone when removal required the concurrence of the Senate.

This example illustrates that the background rule governing removals could not have been the symmetry rule, but a modified version of the symmetry rule. In the absence of other statutory language, officers appointed by the President were removable by the President, even if they were subject to Senate confirmation. Where a statute was silent on removal, the nominating authority enjoyed the power to remove not just through removal as incident to appointment, but as an independent power to remove.

This construction of the background rule would imply that marshals were removable by the President, since the

---

[154] For his appointment, *see* Letter from George Washington to U.S. Senate (Mar. 4, 1791), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-07-02-0286.

[155] *See* Letter from Albert Gallatin to Thomas Jefferson (July 6, 1801), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-34-02-0397.; Letter from Thomas Jefferson to U.S. Senate (Jan. 6, 1802), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-36-02-0183-0007.

President nominated them. And indeed, in practice, presidents did remove marshals. By the same letter through which Jefferson had nominated Dunham's successor, he nominated John Willard to become marshal for the District of Vermont "vice Jabez G. Fitch removed."[156] Fitch had been initially nominated (by Washington) and confirmed to his position in June 1794,[157] and had been renominated (by Adams) and reconfirmed in June of 1798 when his first term had expired;[158] when Jefferson removed him in January 1802, it was before the end of his third four-year term. Of the 10 marshals removed before 1820, all were removed by the President.

Deviations between the statutory language governing marshals and customs officials show how the background modified symmetry removal rule operated as a defeasible convention of statutory drafting rather than an indefeasible rule. If the background rule were indefeasible despite statutory language to the contrary, there would have been no need for the Judiciary Act of 1789 to specify that marshals were removable at pleasure. Treating the background rule as a defeasible convention of statutory drafting makes the statutory language make sense. Marshals, unlike customs officials, enjoyed a specific statutory term of office. And, as Professors Manners and Menand have persuasively shown, statutory terms of office were understood to bar removal during the term of service. If the statute had only included a statutory term of office, the marshal would have been unremovable during his 4-year term, except by impeachment or court order.

For the President to enjoy the power to remove marshals, then, the statute needed to specify the power explicitly. The statute did not need to identify who could do the removing, since the background rule would give that power to the appointing authority—here, the President. But if the statute had not specified that the marshals could be removed at pleasure, then the President would not have had the power to remove them

---

[156] Letter from Thomas Jefferson to U.S. Senate (Jan. 6, 1802), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-36-02-0183-0007.

[157] Letter from George Washington to U.S. Senate (June 7, 1794), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-16-02-0164.

[158] Letter from John Adams to U.S. Senate (June 25, 1798), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/99-02-02-2650.

before the end of their term, because of the statutory bar. By specifying that marshals could be removed at pleasure, the Judiciary Act created a "removal permission," allowing the President to break the tenure granted by the term of office.[159]

That the modified symmetry rule operated as a defeasible background rule is further confirmed by the language in the Judiciary Act stating that deputy marshals were removable by District Court and Circuit Court judges. Deputy marshals were appointed by marshals, not judges. Had the statute said no more, it would presumably have been the marshals who enjoyed the power to remove their appointed deputies. To grant the power to judges, and so break the modified symmetry rule, the statute needed to say so explicitly.[160]

C. Specifying Removal: Who, How, and Why

The contrast between the statute governing customs officials and the statute governing marshals reveals not only that there were background rules and what those background rules were, but also how the rules could be varied. While statutes did not need to say anything about removal, they could say a lot. In particular, statutes could vary (1) who removed, (2) how removal happened, and (3) what standard would justify removal. We can call this the "who," "how," and "why" of removal law.

When unspecified, the "who" was usually the President. So, for example, just as with customs officials and marshals, the statutes creating U.S. Attorneys,[161] tax assessors,[162] and loan commissioners,[163] among others, did not specify who had the power of removal. But presidents variously removed officers from all three positions.[164]

A missing "who" did not always mean the President. To take an obvious example, the act that established the clerks and chaplains for the House and Senate, along with other legislative

---

[159] Manners & Menand, *The Three Permissions*, *supra* note XX.

[160] Whether the Judiciary Act of 1789 deprived marshals of the power to remove their own deputies (by granting the power to judges) or simply granted judges the power to remove deputy marshals in addition to marshals is a matter of debate.

[161] Judiciary Act of 1789, ch. 20, 1 Stat. 73.

[162] Act of Aug. 2, 1813, ch. 56, 3 Stat. 82.

[163] Funding Act of 1790, ch. 34, 1 Stat. 138.

[164] E.g.: U.S. Attorneys: Richard Harrison, Charles Marsh, and George Woodruff; Loan Commissioner: John Pierce; Tax Assessor: Andrew Backus.

officers, did not include any language on removal.[165] But no one imagined that the President had the power to remove these officers, and there is no record of any of them having been removed by a President.

This is what we would expect from the default rule. U.S. attorneys, tax assessors, and loan commissioners were all nominated by the President. The modified symmetry rule would have them removable by the President. The officers of the House and Senate, on the other hand, were selected by the legislature. The modified symmetry rule would have them removable not by the President but by the House and Senate, which seems to be what happened.

Sometimes a statute would specify a "who" for removal who enjoyed the removal power already under the default rule. Call them "redundant whos." For example, a 1799 Act created directors of marine hospitals, to be appointed by the President alone.[166] By the default rule, the President should have been able to remove them as well. The statute nevertheless granted the President that power explicitly, stating "that the said directors shall hold their offices during the pleasure of the President, who is authorized to fill up all vacancies that may be occasioned by the death or removal of any of the persons so to be appointed."[167] In this case, it seems the specification of the "who" of removal was unnecessary.

Not all whos were redundant whos, though. Where an office departed from the default rule, or where there might be confusion, the "who" of removal was almost always specified. So, as discussed in Section B, the Judiciary Act empowered marshals to appoint their deputies, but made deputy marshals removable by judges. This is a departure from the default rule. Without the statutory grant, the judges would have had no power to remove deputy marshals.[168]

Or consider the law that set up the government in the Northwest Territory.[169] Under the Articles of Confederation, the governance of the territory was directly in the hands of

---

[165] Act of Sept. 22, 1789, ch. 17, 1 Stat. 70.

[166] Act of July 16, 1798, ch. 77, § 5, 1 Stat. 605, 606.

[167] *Id.*

[168] Marshals may well have retained the power to remove their deputies, but not because of removal law, but the law of deputies, which empowered principals to revoke commissions to deputies. *See* Nathaniel Wald Donahue, *Officers at Common Law*, 135 YALE L. J. 1887, 1932 (2026).

[169] Northwest Ordinance of 1789, ch. 8, 1 Stat. 50.

Congress, and under the Constitution, territorial governance was the specific province of Congress.[170] There might well have been some question whether, under the Constitution, the power to remove officers of the Northwest Territory lay with Congress or the President. The new act cleared that up by transferring authority for territorial governance to the Executive, granting the President the power to appoint the officers of the territory (subject to Senate confirmation), and specifying that "in all cases where the United States in Congress assembled, might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal."[171]

Laws that regulated the size of the armed forces often gave the President an explicit removal power for commissioned officers, perhaps for the same reason.[172] There were several such laws in the early republic, even though the President would enjoy his constitutional powers as commander-in-chief in addition to whatever removal power he might have by the background default modified symmetry rule. Perhaps neither of these last two grants was thought to be sufficient, on their own, to authorize removal, since the Constitution also gave Congress far-reaching authority over the armed forces, and Congress often specified a term of service in its armed forces statutes.

The "who" of removal was independent of the "how" and the "why." Removal at pleasure, at will, "at . . . discretion,"[173] or "whenever . . . expedient,"[174] was common, although it is not clear whether these terms were perfectly interchangeable. Whatever they meant, they do not seem to have covered removal for dislike, loss of favor, or mere personal disagreement. As discussed in Part II, at will removals were almost always what a modern observer would call for cause, and presidents attached causes even for officers they could remove at will. Thus, of the ten marshals and forty customs officials removed between 1789 and 1820, none but those removed by Jefferson were removed for

---

[170] *An Ordinance for the Government of the Territory of the United States North-West of the River Ohio*, 32 J. Continental Cong. 334 (1787); U.S. CONST. art. IV, § 3, cl. 2.

[171] 1 Stat. 50-53 (1789).

[172] *See, e.g.*, Act of Mar. 3, 1791, ch. 28, 1 Stat. 222; Act of May 28, 1798, ch. 47, 1 Stat. 558; Act of Mar. 2, 1799, ch. 31, 1 Stat. 725.

[173] Act of Mar. 3, 1791, ch. 28, § 5, 1 Stat. 222-23; Vaccine Act of 1813, ch. 37, § 2, 2 Stat. 806.

[174] Act of Apr. 20, 1818, ch. 83, § 5, 3 Stat. 441.

explicit or identifiably partisan reasons, and, of those for whom reasons for removal can be identified, the most common reasons are straightforwardly what a contemporary reader would call cause.

At will removal was often combined with tenure for a set term. This arrangement was especially common for statutes erecting territorial governments and setting out the terms of military enlistments. As Professors Manners and Menand have discussed, in such contexts the grant of a power to remove operated as a permission to break the statutory tenure, which otherwise barred removal during the term of office.

Not all statutes with set terms included removal permissions. Justices of the Peace in Washington DC, for example, served a five-year term with no removal permission.[175] As initially set up, the territorial legislature for Louisiana was appointed annually for a 1-year term, apparently without a removal permission,[176] as was the Mayor of Washington, DC.[177] There were also several commissions with limited terms, whose commissioners were appointed without the possibility of removal, as Professor Nourse has described.[178] These terms of service were universally respected. Our data does not include any example of a President (or anyone else) removing an officer in violation of a statutory term of office without an explicit removal permission.

Statutes could also set a higher standard for removal than "at will." Consider for example, the 1798 Act to Lay and Collect a Direct Tax. The law empowered supervisors in each district to appoint collectors to actually retrieve the owed monies.[179] Appointment was apparently at will. But, when it came to removal, "it shall be lawful for the supervisors of the respective districts, at any time, for good and sufficient cause, to dismiss or discharge each or any collector from office."[180] The statute wrote the for-cause expectation behind at will removals into law. While collectors could be appointed for any reason, they could only be removed for a good one.

---

[175] Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 103, 107 (organizing the District of Columbia).

[176] Act of Mar. 26, 1804, ch. 38, § 4, 2 Stat. 283 (establishing provisional government of Louisiana).

[177] Act of May 3, 1802, ch. 53, § 5, 2 Stat. 195, 196.

[178] Nourse, *supra* note 135.

[179] Act of July 14, 1798, ch. 75, § 4, 1 Stat 597, 599.

[180] *Id.* § 11.

Other statutes went beyond requiring "good and sufficient cause" to define specific causes that would lead to removal. Thus, the 1789 statute that created customs officials also prescribed "that no goods, wares or merchandise, shall be unladen or delivered, from any ship or vessel, but in open day, or without a permit from the collector for that purpose" and that anyone "aiding or assisting in landing, removing, housing, or otherwise securing the same" would be subject to fine and "be disabled from holding any office of trust or profit under the United States, for a term not exceeding seven years."[181] This is an automatic removal for smuggling-adjacent behavior. The statute did not merely require good cause in a generic sense; it identified a certain set of causes that would trigger removal automatically.

Automatic removals, like the one that governed shady customs officials, were not uncommon. Similar provisions applied to other treasury officials,[182] postmasters,[183] and Indian agents,[184] among others, often as a collateral consequence attendant upon conviction of a specific offense narrowly defined in the statute. Thus, a 1797 stamp tax announced that "any clerk, officer, or person," who circumvented the tax was guilty of fraud "and being thereof lawfully convicted, . . . if an officer of the United States, shall, in addition [to a fine], forfeit his office and be disabled to hold or enjoy the same for the future."[185]

Automatic removal provisions illustrate the way the "how" and "why" of removal could interact. Where the "why" was capacious, statutes did not need to specify "how." But where the "why" was more specific, statutes could include elaborate procedures that the "who" needed to follow.

Consider, in this respect, the Coinage Act of 1792. The celebrated statute that created the U.S. Mint, it included, among many other provisions, an extremely detailed account of the different coins to be minted and the relative quantities of precious metals they were to contain. The statute also erected an elaborate removal procedure, "the better to secure a due conformity of the said gold and silver coins to their respective

[181] Act of July 31, 1789, ch. 5, § 12, 1 Stat. 29, 39.
[182] Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67.
[183] Postal Service Act of 1792, ch. 7, § 11, 1 Stat. 232, 235.
[184] Act of Apr. 18, 1796, ch. 13, § 3, 1 Stat. 452.
[185] Act of July 6, 1797, ch. 11, § 13, 1 Stat. 527, 530.

standards."[186] Every year, the Treasurer of the Mint was to set aside at least three coins from each batch of bullion coined. Then, "under the inspection of the Chief Justice of the United States, the Secretary and Comptroller of the Treasury, the Secretary for the Department of State, and the Attorney General of the United States . . . and in the presence of the Director, assayer and chief coiner of the said Mint" the coins were to be assayed, to assess their purity.[187] If the coins turned out to be within one part in one hundred and forty-four of the statutorily prescribed purity standards, "the officer or officers of the said Mint whom it may concern shall be held excusable." "[B]ut if any greater inferiority shall appear, it shall be certified to the President of the United States, and the said officer or officers shall be deemed disqualified to hold their respective offices."[188]

The logic of the statute is straightforward and explicit. It sought to ensure the integrity of the new republic's currency. To do that, it made the tenure of the Mint's officers turn on the quality of the coinage. The "why" of removal—the standard justifying removal—was a function of the purpose of the statute and the agency it created: mint officers would be removed from office if their coins were more than one part in one hundred and forty-four impure. The "how" of removal—the mechanism for removing them—was keyed to this specific purpose: a technical evaluation of the coinage, in the presence of the officers, by disinterested third parties.

In the process, the statute shifted the "who" of removal as well. The statute never specified who was to appoint the officers of the Mint, suggesting a reliance on the Constitution's background appointment rules, which placed the power in the President with the advice and consent of the Senate. (Sure enough, President Washington nominated the first director of the Mint, David Rittenhouse, after the enactment of the Coinage Act, and he was confirmed by the Senate to his position on April 14, 1792.[189]) Under the default modified symmetry rule, it would

---

[186] Coinage Act of 1792, ch. 16, § 18, 1 Stat. 246, 250.

[187] Note that the Act allowed for the inspection of the coinage by any three of the named officials.

[188] *Id.* Losing a job was a mild punishment compared to the other sanctions the statute described. If any officer or employee at the mint debased the coinage for profit or embezzled metals, they "shall be deemed guilty of a felony, and shall suffer death." *Id.* § 19.

[189] Letter from George Washington to U.S. Senate (Apr. 13, 1792), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE,

be for the President to remove mint officers. But the statute placed the removal power in a committee made up of the Chief Justice, the Secretary of the Treasury, the Comptroller, the Secretary of State, and the Attorney General, and limited their discretion stringently. The "who" of removal, here, seems ultimately to rest with a technical process. If the inspecting committee found that a particular factual condition obtained—the coins were not sufficiently pure—the relevant Mint officers were out of their office. The statute self-executed the removal.

D. Towards a Theory of Removal in the Early Republic

We can combine the background default rules of removal from Section B with the statutory variations and evidence from practice from Section C to create a general picture of how removal law worked in the early republic. This is necessarily a hypothetical sketch; we cannot know for sure what lawyers and politicians thought of the law, or whether they shared a single understanding of removal. Nevertheless, this theory does parsimoniously account for the data we have and is compatible with extant contemporaneous writings.

The starting point: Removal was a statutory feature of the design of the office. All federal offices, excepting those created by the Constitution, were creatures of statute. Those statutes could define every aspect of an office, including its title, salary, responsibilities, and other conditions of employment. Some statutes did this office-by-office, but others did so in a general way for multiple office at once. Statutes could also define how officers were to be appointed, within the bounds of the Constitution, and how they were to be removed—by whom, according to what procedures, and for what reasons.

Not all features of an office were always explicitly specified by statute. Some offices were created with some of their attributes left undefined. Where an office was not fully defined by explicit statutory text, background default rules governed. As concerns removal, where a federal statute was silent on removal, the background default rule was the modified symmetry rule, according to which the power that nominated had the power to remove.

---

https://founders.archives.gov/documents/Washington/05-10-02-0155.

Where no mechanism for removal ("how") or standard of removal ("why") was specified, the removing "who" generally removed officers only for obvious cause and did not remove officers for venal or personal reasons. If the removals were for reasons other than cause—and in particular if removals took place for partisan reasons—some officers objected and expected to receive a sympathetic hearing.

Where there was confusion over who might have the removal power, statutes often specified it explicitly. More generally, where there was a reason, statutes frequently departed from silence and sometimes departed from the background default rules as well.

From analyzing which statutes included detailed removal provisions and what those provisions said, it seems that offices of trust, expertise, or with a heightened risk of self-dealing were the most likely to receive specialized removal regimes. Statutes creating offices like customs officials, revenue collectors, and mint officials reflected an awareness that the officers in question needed to act in the best interest of the American people, exercise a specialized ability, encountered a particularly pronounced risk of self-enrichment at the public expense, or some combination of all three. Statutes defined the "who," "how," and "why" of removal to guard against the specific dangers these offices presented.

Where a term of office was unspecified, the office holder remained in it indefinitely. Leaving aside those officials whose offices were abolished by Congress, the vast majority (87%) remained in office until they resigned, were reassigned, died, or were removed for cause.

Some offices included defined terms of service. Unlike with offices of trust, expertise, or with heightened risk of self-dealing, there does not appear to be any set of principles that unified offices with a term of service. The category includes judicial offices intended to be independent, along with commissioners, political officials, and territorial administrators, among others. Where a statute granted an official a specific statutory term, it usually included additional provisions allowing for at will removal, but not always.

In this way, removal law was eminently pragmatic. The legislature designed offices and had the power to vary their features along several axes: who, how, why, and tenure. It chose designs with the aim of promoting good government and the efficient implementation of the law. But where it did not specify a particular feature of the office, background default rules filled in, leaving the legislature free to focus on what it found most important.

IV. IMPLICATIONS FOR DOCTRINE AND SCHOLARSHIP

Removal in the early republic did not operate as judges and scholars have usually assumed. The Supreme Court, drawing on some academic work, has argued that removal is an indefeasible constitutional power enjoyed by the President. But new evidence from practice and a comprehensive review of early republic statutes combine to create a very different picture of removal: one in which it was a statutory feature of the office. While it was governed by certain background default rules, explicit text often varied those rules, particularly in the case of offices of trust, expertise, or with a heightened risk of self-dealing.

This Part draws out the implications of our findings for current law and scholarship. For more than a century, judges, lawyers, historians, and legal theorists have relied on an account of removal in the early republic that originated during the Progressive Era, along with embedded assumptions proper to that time. Doctrine and scholarship built on those weak foundations, compounding errors into constitutional doctrine.

A comprehensive, empirically-grounded account of removal practice in the early republic forces revisions on three distinct audiences. Section A draws out our study's conclusions for judges and lawyers. It puts a limit to the Court's evolving removal jurisprudence, at least for jurists who believe in the relevance of historical practice, and shifts the attention to what Congress can do with statutes to build out the government even now. Section B turns to implications for legal scholars. This article offers a corrective to the prevailing historical account of UET, one that has hardened into unexamined doctrine, and counsels a different understanding of separation of powers. It also offers a way into thinking about one of the hardest and most important questions in Article II jurisprudence: the source and reach of the president's directive authority. Section C focuses on historians. It identifies a citation-inheritance problem in existing histories of removal and public administration, and it argues for a more contextual approach to using history in law.

A. Rethinking Current Removal Law: Less Presidency, More Congress

Our findings unsettle a premise that underlies every removal-power opinion of the Roberts Court: that removal is, and always has been, an exclusively executive power, exercised independently of, and incapable of modification by, Congress. Early republic authority and practice do not support that premise.

Rather, in the early republic, removal could be an executive, judicial, or even legislative power, depending on the design of the office. Likewise, removal as a practice emerged through a shared outlook concerning both appointment and removal that involved both the President and Congress, with the two institutions managing their conflict because they agreed on their roles in the process. As discussed in Part III, and as attested to by the practice described in Part II, many offices included a presidential removal power, whether by default background rule or by explicit statutory text. But some statutes, like the one for the administration of the stamp tax of 1797 or the Judiciary Act of 1789, created a removal power lodged in the judiciary. In the case of the stamp tax, removal operated as a collateral consequence upon conviction but, for the deputy marshals created by the Judiciary Act, it was to be exercised by judges at pleasure. And other statutes seem to have effectuated a removal by act of statute alone, as with several of the automatic removal provisions discussed in Part II. Certainly the legislature regularly redefined offices and, in the process, removed officers. Postal officials, for example, held their positions subject to terms fixed by statute, with turnover following directly from congressional revision.

Importantly, depending on the design of the statute, officers could be removed from office without any action by the President. When a new law reorganized part of the government, such as the numerous acts that transformed territories into states or the Judiciary Act of 1802, officers were removed without any additional presidential action besides signing the law. But a statute could also cause removals independent of presidential involvement without abolishing an office, as in the

Coinage Act of 1792. Officers at the Mint were subject to a statutorily-prescribed process, which did not include the President and involved one actor over whom the President had no control at all, the Chief Justice. This process could lead to the removal of mint officers, without regard for the president's judgment, discretion, or intervention.

Presidentialists may counter that neither this example nor any other identified by this Article refutes the claim that the President continued to enjoy a removal power directly under the Constitution. That a statute like the Coinage Act created a removal mechanism independent of the President does not mean that it deprived the President of a (hypothesized) already existing removal power. Automatic removal provisions like the one detailed for officers of the Mint, customs officials, and other officers could be in addition to the president's removal power, rather than in place of it. Indeed, in the case of customs officials and postmasters, this was clearly the case, as presidents removed them directly, rather than relying exclusively on the more burdensome automatic removal provisions detailed in the statute.

Before responding to this claim, it is worth addressing what it already concedes. If removal is not an exclusively executive power, then presidentialists need to identify another source for the president's supposed authority. It cannot be the Vesting Clause, unless presidentialists are willing to accept that some "executive" powers might turn out to be "legislative" and "judicial" as well—in which case the Clause loses its usefulness for adjudicating separation of powers disputes. This article claims that the President might continue to enjoy a removal power in some cases as a background default rule of statutory construction—the modified symmetry rule. But if the president's removal power exists only as a matter of statutory presumptions—that a statute incorporates the modified symmetry rule, unless it does not—then a statute could eliminate or restrict the president's removal power. Perhaps presidentialists will turn their focus from the Vesting Clause to the Take Care Clause, despite the scholarship discussed in Part I that marks it out as a duty. If removal does follow from the Take Care Clause, it imposes an inherent limit on the constitutional removal power: the President could only remove when it would be in furtherance of his responsibility to take care that the law is faithfully executed.

In any case, the data gathered in this article is not compatible with the strong presidentialist thesis according to which the President enjoys a constitutional power to remove all government officials. Some government officers, like legislative officers, seem to have been beyond the reach of presidential removal. And other government officers enjoyed terms of service without removal permissions. In no case were we able to find a government official removed by the President without statutory authorization, whether such authorization came through a removal permission or the application of the background modified symmetry rule. We are not aware of a single instance in which the President removed an official where the statute evinced an intent to limit removal.

The true smoking gun would be an example of an early republic President seeking to remove an official he had appointed, but where he was stymied by either a statutory term of office that did not include any removal permission, or a law creating the office that defined the "who," "how," and "why" of removal in such a way as to foreclose (whether implicitly or explicitly) the possibility of presidential removal through the background default rule.

Unfortunately, the realities of archival practices and the office-holding culture of the late 18th and early 19th century make finding such a smoking gun unlikely. As discussed in Part II, presidents left only limited information about their approaches to removal, and bureaucratic processes did not systematically record the mechanics of removal. If a President had been stymied by a statute, they may not have left a documentary record of it, and if they had, it might not have survived to today.

Moreover, the practice of office holding in the early republic would have militated against such a direct clash between presidential desire and statutory text. The persons staffing the early republic were few in number, turnover was high, presidents were directly involved in the time-consuming process of filling vacancies, and it was challenging to find qualified officers willing to take even prestigious positions. Presidents thus tended to stick with officials they may have otherwise wanted to dismiss. To remove an officeholder would necessarily cast aspersion on the removed official, which, given then gentlemanly world of early republic politics, further constrained a would-be remover. Finally, presidents actively sought to follow the law, which led them away from direct clashes with the legislature.

This was the backdrop against which officer-creating statutes specified the conditions governing offices. That culture is an inextricable part of early republic statutory interpretation. Statutes offered additional constraints layered on top of an already constraining set of practices and expectations.

The two halves of this picture reinforce each other: removal in the founding era was not organized around a single presidential lever pulled or withheld at the President's sole wishes. It built around a set of mechanisms—judicial, legislative, administrative, and political—of which presidential will was only one, and not always the operative one. Where the President had the evident desire to remove an officer, and the authority to do it, his discretion was constrained not just by law but by a thick layer of norms and expectations: legislative sensitivity, public norms against partisanship, officers' expectation of continuity, professional custom. This culture of governance made dismissals a costly and infrequent act rather than a routine tool of administration.

These practices indicate that *Slaughter*—and with it, the Roberts Court's recent removal jurisprudence—is essentially misconceived. In identifying an "unrestricted" presidential removal power as a "general rule" of the Constitution, the Supreme Court has constitutionalized a historical fiction. It simply is not the case that the Constitution envisioned a President who would control the government through the threat of removal.

Looking to the future, this study should put a limit to what an originalist or historicist Court can do with *Slaughter*. As we read the history, statute could limit the president's ability to remove government officials, particularly those in offices of trust, expertise, or that raise the possibility of conflicts of interest. Provisions like those at issue in the recent removal litigation—namely, laws insulating officers so that they can carry out statutorily assigned, expert-driven functions without being subject to at-will presidential displacement—seem to sit comfortably within a tradition in which offices routinely carried their own, non-presidential removal logics, particularly where the function being protected was technical, adjudicatory, or otherwise structured around expertise Congress had reason to want protected from political turnover.

If the Court refuses to deviate from *Slaughter*'s expansive removal power in the future, this history decisively shows that statutes can place removal powers in others besides the President. In particular, they can force the automatic removal of officials who fail to abide by statutory prescriptions. This can be a powerful tool for preventing the President from treating the government as an extension of his personality.

In that way, regardless of what the Court might do, this history stands as an invitation to lawmakers. The early republic embodies a pragmatic tradition of office design to advance good government. Legislators can embrace creative approaches to removal to promote efficient, trustworthy government. Especially when it comes to offices of trust, expertise, or with a high risk of conflicts of interest or self-dealing, there is a well established history and tradition of office design that guards against maladministration. Those mechanisms remain available to institutional designers even in a time of presidential removal.

B. Rethinking Legal Scholarship: Approaching the Early Republic Constitution through Statutes and Practices

Beyond doctrine, our study demonstrates several conclusions for the study of public law in the early republic. In particular, it should encourage a reexamination of the assumption that the Constitution created a government under the thumb of the President and draw attention to the role of statutes in building up a presidency-centered government.

With respect to the removal power in particular, this study refutes the idea that the Founders viewed removal as a quintessentially or exclusively executive power. Instead, it supports a view of removal as a shared power. It was regulated by all three branches, capable of being vested in actors other than the President, and circumscribed by law and practice.

This challenges UET directly, of course. To be sure, early republic actors did default to presidential removal as a baseline. But this was a legislative choice, not a constitutional prescription. This Article thus invites a further question: when, and under what circumstances, did early republic actors embrace presidential removal?

On our interpretation of the statutes and practices, the Framers seem to have been motivated by a concern to promote effective administration. The statutes they crafted guarded against threats to good government, whether those came from incompetence, venality, corruption, or other sources. Presidential removal practice tracked these same concerns. Presidents removed officials for dereliction of duty, whatever the underlying reason. Early republic actors thus seem justified in their belief that the President was usually best suited to remove "bad" actors from holding office.[190]

Yet this belief depended on the circumstances of the government. In some contexts, good government might countenance not presidential control, but insulation from the President. Early republic legislators apparently embraced this, too. As Professor Christine Chabot explains, Hamilton's 1790 Sinking Fund Commission was inspired by similar bodies in England, though designed to avoid their widely known problems. "[S]inking fund commitments 'were often honored in the breach and sometimes abused,' as 'fund accumulations were raided over and over for spending purposes other than debt redemption.' The 'flaw,' … was 'to leave Parliament and the king's ministers in charge' of funds accumulated for debt repayment."[191]

While this study has focused on removal, our investigation of early republic statutes and presidential practice identified other data that supports this more mutable understanding of the place of the President in the early administrative state. Statutes could be very precise about where an office was located within the emerging government's organizational chart, to whom the officers reported, and how their chain of command was structured.

Intriguingly, when statutes wanted to identify that the President was in charge, they could. Thus, the 1789 act that initially established the Post Office noted explicitly that "the Postmaster General [was] to be subject to the direction of the President of the United States in performing the duties of his office."[192] Similarly, an 1802 act reorganizing the government of Washington DC replaced a board of commissioners with a

[190] Quote from First Congress legislative deliberations.
[191] Chabot, *supra* note 130, at 37-38.
[192] Act of Sept. 22, 1789, ch. 16, § 1, 1 Stat. 70.

superintendent, "to be appointed by, and to be under the control of the President of the United States."[193] Not all statutes subjected officers to presidential control or direction.

This pattern of variation demonstrates how, even though early republic actors did not rely on the removal power as a tool of presidential control, they were not oblivious to concerns of what we now call public administration. They thought about how the government should be organized. Sometimes they chose to give the President a controlling share in running the government, but not always. As with removal, the place of the President in government varied by statute, within constitutional constraints.

This alternative approach might allow for purchase on one of the most important unresolved questions about Article II: the source and extent of the President's directive authority. Scholars have long recognized three presidential domestic administrative powers: appointment, removal, and direction. But the directive authority has always been the most inchoate of the three, lacking specific constitutional text. Scholars and judges have relied on the removal power as a proxy for control. But, if our analysis of the history is correct, this is anachronistic and unjustified.

Embracing the more mutable conception of executive power embodied in early republic removal law and evinced in these snippets of statutory text and practice offers a different way to study directive authority. It requires a fundamental shift in mindset. We have to accept that we might not know what separation of powers is or is supposed to be, and, instead, be open to the foreignness of how early republic actors understood their government. More concretely, this means moving away from reified formal Constitutional categories and towards an attention to the nuances found in early republic statutes.

Understanding the early republic Constitution through statutes and institutions requires looking at both text and practice. To the extent that our study has recovered a wide range of removal mechanisms other than presidential removal, it invites refutation, corroboration, or enrichment through accounts of how they worked. Was presidential removal truly an "effective" form of public administration? Did automatic removals serve their intended deterrent function? Did technical

[193] Act of May 1, 1802, ch. 41, § 2, 2 Stat. 175.

limitations in administrative "superintendence"—eighteenth-century challenges of distance, space, and time—render these technologies inoperable? Do they explain the rise of the Four Years Act, which gave way to a system of automatic rotation in office?

From a methodological point of view, our study also invites historically-minded scholars to embrace historical gloss as a method of legal argument. The Framers, like functionalists today, were pragmatic, seeking to design a government that was simultaneously efficacious and accountable. In devising new theories of public administration in the wake of the Roberts Court, we can continue to take inspiration from their example.

C. Rethinking Historical Scholarship: Contextual Reading and the Law

Finally, this study has important consequences for historians of public administration and those who rely on their scholarship. Since the turn of the twentieth century, Carl Fish's study of presidential removal, which included a dataset on removals Fish coded himself, has been the keystone on which countless studies of early American removal rest.[194] Fish's work was representative of his time.

But it is time to stop relying on it. Fish has become the go-to source for historians attempting to understand federal removal. But his study contained several prominent coding errors, he provided minimal citation about his sources, and he defined the term "removal" overbroadly and inconsistently. Our study aims to replace Fish's now-aged foundation with more complete data.

Additionally, we hope to spur the creation of new historical narratives about removal, and government operations more generally, at the Founding. In recent years, a new generation of scholars of early American statebuilding has unshackled itself from earlier assumptions about what the state looked like and what the Founders thought about it. They have shown that the early republic was vibrant, creative, and most of all present.

This Article contributes to this growing field by enriching our understanding of the law and practice of federal staffing.

[194] *See* Part I.C, *supra* (canvassing scholars who have relied on Fish and his data).

Attending to removal during the early republic reveals a legal and political culture that was both more consistent and less anti-statist than expected. Throughout the first years of the new government, the Executive and Legislature established unspoken but also unbroken norms of power-sharing that allowed for the development of the federal workforce.

Those norms were legally significant. The drafting conventions that the legislature relied on took shape against the backdrop of that distinctive political culture. At the same time, it was the very durability of that political culture that enabled the development of the laws and practices that created the fledgling American state. When, in 1820, Congress enacted and the President signed the first, general Tenure of Office Act, it marked the end of a particular kind of settlement. Its passage indexes a transformation in state, culture, and law all at once.

This reperiodization should change how historians think about law in the early republic and how lawyers interested in early republic history think about the law. For historians, it should emphasize the multiple roles law plays. Looking at removal in a more systematic ways highlights the many different goals inherent in office design. It brings out the way written law depended on unwritten practices. And it shows how law illuminates broader questions of state formation. Studying doctrine is not necessarily at a remove from the questions at the heart of the field.

For lawyers, the Article encourages a new, more contextual methodology. Studying the law of the early republic without attending to the culture in which it was embedded is misleading. This is true even at the pure level of doctrine. We simply cannot understand what law governed customs officials, marshals, or mint officials without looking to the practices of officeholding in which they participated. Just to interpret the statutes that created those offices and answer basic questions about them, such as who had the power to appoint, to remove, and under what circumstances they could do so, we need to become familiar with a much broader context, including the conventions of early republic record keeping, the practices of presidential appointment, the norms of Senate confirmation, and the gentlemanly habits of remonstrances.

This Article has sought to embody this contextual approach. By studying removal law through the lens of removal practice, it uncovers background conventions and shows where silences are meaningful. There is no reason to think removal law is especially suited to this approach. What is true of the law of officers is surely true of other old law too. Lawyers need not all become historians. But if they want to read past law, they should learn about the past to understand how to read it.

CONCLUSION

In 1820, the first Tenure of Office Act put a four-year term to many federal offices and granted the President an at-will removal permission to break their tenure prematurely. With the enactment of the Four Years' Law, the history canvassed in this Article came to a close. In that moment, Congress itself declared the informal, office-specific system of the early republic obsolete and replaced it with something categorically different. Authored by Treasury Secretary William H. Crawford and enacted over James Madison's objection that an arbitrary four-year term set a precedent for Congress to limit tenure "to as short as a day," the statute imposed fixed terms but specified that the President might nevertheless remove them at will. The law applied to a wide swath of jointly appointed officers who had previously held their positions at pleasure but without any term limit at all. Where the early republic practice we have described relied on scattered, office-specific mechanisms to govern turnover, the Four Years' Law substituted a single, uniform, calendar-driven trigger for reconsidering tenure.

Nine years later, Andrew Jackson would seize on this mechanism, treating each officer's arrival at the end of a four-year term as an occasion for wholesale rebuilding rather than routine reappointment. His radical embrace of rotation in office converted a statute originally justified as an efficiency and accountability measure into the engine of the spoils system. It would entrench the two-party patronage politics that defined nineteenth-century American governance.

The contrast between the government of Jacksonian America and the world of the early republic could not be sharper. In the "patrician" system recovered by this article, officers were removed rarely, usually for cause, and, with the exception of Jefferson, never for partisan reasons. When an officer was fired, it was because of his particular character vices rather than a question of his loyalty to the President. Under Jackson, all that mattered was party loyalty. The gentlemanly world of the early republic gave way to a system in which turnover became cyclical, wholesale, and explicitly organized around partisan reward.

That the spoils system eventually gave way to its own successor—a professionalized civil service insulated from the partisan turnover Jackson had institutionalized—did not require inventing a new constitutional theory of removal. The new world could be built on a recovery of the old. *United States v. Perkins*, decided in 1886, just three years after the Pendleton Act inaugurated the modern civil service, held that when Congress vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest.[195] *Perkins* did not have to break new constitutional ground to reach this result. It had only to recognize what the early republic practice already showed: that removal was never uniformly and inherently presidential. Rather, removal was a property that Congress could attach to an office as it saw fit. In this sense, the professionalization movement of the late nineteenth century was less a departure from Founding-era practice than a return to its underlying logic, dressed in the vocabulary of merit and expertise.

This Article has reconstructed that early republic understanding. Between 1789 and 1820, removal was widely understood to be a statutory feature of office, not an indefeasible constitutional power. Explicit statutory language could vary who removed, how they were removed, and under what circumstances removal was appropriate. Congress drafted against background presumptions, that we can reconstruct from extant practice. But it could depart from those presumptions, as it frequently did with offices of trust, expertise, or a high risk of conflict of interest. Given the actual practice of removal, in which removal at will was in fact for cause, and Presidents respected congressional enactments, the governing law could often be silent, and Congress could reliably count on the President to advance the shared goal of effective, efficient good government.

This way of thinking about removal is very different from that embraced by the Supreme Court in its removal revolution, on both substance and method. Substantively, it breaks with the

[195] Perkins, 116 U.S. 483.

Court on whether removal is an inherently executive power. Methodological, it counsels contextual reading in place of decontextualized, anachronistic appropriation. If future jurists rely on better empirics and embrace a more historical sensibility, they can avoid the errors of the current Court.

Ironically, so doing would bring them closer to the Founders, and put our law in a better position to deal with the governance crises of today. The arc this Article has traced runs from an early republic in which removal was a discrete, office-bound property of government, through a nineteenth-century interregnum in which Jacksonian rotation and party patronage briefly made our government into something else entirely, to a professionalizing state that reinvented, without fully reconstructing, structures of insulation that the Founding generation would have found unsurprising. As we stand on the edge of a new regime of federal office holding, the early republic has lessons to teach us anew.